91-429

No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

In Re GEORGE R. WESTFALL,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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QUESTIONS PRESENTED FOR REVIEW

A state supreme court disciplined a lawyer/prosecutor under its ethics rules for publicly criticizing an appellate court opinion in a case prosecuted by his office. The criticism, which the supreme court viewed as reflecting adversely on the authoring judge, was that the opinion was wrong, result-oriented, rested on reasons that the lawyer thought "somewhat illogical" and "even a little bit less than honest," and "distorted" the applicable statute.

The questions presented are:

1. Whether the First Amendment bars a State from disciplining a lawyer for publicly criticizing a judge, where the lawyer's criticism does not contain false statements of fact made with "actual malice" within the meaning of *New York Times Co. v. Sullivan,* and the criticism could not have prejudiced any adjudicative proceeding.

2. Whether the First Amendment precludes a State from disciplining a lawyer for criticizing a judicial opinion because such criticism does not state actual facts about an individual which are provable as false.

PARTIES BELOW

The Advisory Committee of the Missouri Bar initiated this case in the Missouri Supreme Court as an original disciplinary action by filing an information. The matter was prosecuted in the court below by the Missouri Bar Administration.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties Below	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional and Rule Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Petition	10
1. This Case Presents an Important, Unresolved and Frequently Recurring First Amendment Issue on Which State Supreme Court Decisions Conflict.	11
2. The Decision Below Conflicts With *New York Times Co. v. Sullivan* and its Progeny.	16
3. The Decision Below Conflicts With *Milkovich v. Lorain Journal Co.*	22
4. *Gentile v. State Bar of Nevada* Weighs in Favor of Granting *Certiorari* and Undertaking Plenary Review.	27
Conclusion	30
Appendix (Separate Volume)	

TABLE OF AUTHORITIES

Page(s)

CASES:

Albernaz v. United States, 450 U.S. 333 (1981) 5

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 11

Bose Corp. v. Consumers Union of United States, 466 U.S. 485 (1984) 23

Bridges v. California, 314 U.S. 252 (1941) 19

Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975) 20

Committee on Legal Ethics v. Douglas, 370 S.E.2d 325 (W. Va. 1988) 12,14

Committee on Legal Ethics v. Farber, No. 19909 (W. Va. June 27, 1991), 1991 WL 113077 12

Committee on Professional Ethics and Conduct v. Hurd, 360 N.W.2d 96 (Iowa 1984) 15

Craig v. Harney, 331 U.S. 367 (1947) 18

Eisenberg v. Boardman, 302 F.Supp. 1360 (W.D. Wisc. 1969) 14

Garrison v. State of Louisiana, 379 U.S. 64 (1964) ..... 9,17 and *passim*

Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991) ..... 27-30 and *passim*

Greenbelt Cooperative Publishing Association, Inc. v. Bresler, 398 U.S. 6 (1970) 25

Gregory v. Ashcroft, 111 S. Ct. 2395 (1991) 24

Hart-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678 (1989) 17

Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988) 22,25

In re Disciplinary Action Against Graham, 453 N.W.2d 313 (Minn.), *reinstatement granted sub. nom.* In re Reinstatement of Graham, 459 N.W.2d 706 (Minn.), *cert. denied sub. nom. Graham v. Wernz*, 111 S. Ct. 67 (1990) 9,14

In re Donohoe, 90 Wash. 2d 173, 580 P.2d 1093 (1978) 15

In re Hinds, 90 N.J. 604, 449 A.2d 483 (1982) 15

In re Sawyer, 360 U.S. 622 (1959) 21-22

In re Shimek, 284 So. 2d 686 (Fla. 1973) 15

In the Matter of Frerichs, 238 N.W.2d 764 (Iowa 1976) 15

In the Matter of Holtzman, 78 N.Y.2d 184 (1991), *petition for cert. filed* September 9, 1991 14

In the Matter of Johnson, 240 Kan. 334, 729 P.2d 1175 (1986) 15

In the Matter of Lacey, 283 N.W.2d 250 (S.D. 1979) .. 15

In the Matter of Raggio, 87 Nev. 369, 487 P.2d 499 (1971) 15

In the Matter of Terry, 394 N.E.2d 94 (Ind. 1979), *cert. denied*, 444 U.S. 1077 (1980) 15

J.C.J.D. v. R.J.C.R., 803 S.W.2d 953 (Ky. 1991) 15

Kentucky Bar Ass'n v. Heleringer, 602 S.W.2d 165 (Ky. 1980) 15

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 18-20

Louisiana State Bar Association v. Karst, 428 So.2d 406 (La. 1983) 14

Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990) 22-23

Missouri v. Hunter, 459 U.S. 359 (1983) 5

New York Times Co. v. Sullivan, 376 U.S. 254 1964) ..... 9,16-17 and *passim*

Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974) 25

Patterson v. Colorado, 205 U.S. 454 (1907) 28

Pickering v. Board of Education, 391 U.S. 563 (1968) 12

Polk v. State Bar of Texas, 374 F. Supp. 784 (N.D. Tex. 1974) 15

Ramirez v. State Bar of California, 28 Cal. 3d 402, 169 Cal. Rptr. 206, 619 P.2d 399 (1980) 13-14

Ramsey v. Board of Professional Responsibility, 771 S.W.2d 116 (Tenn.), *cert. denied,* 110 S. Ct. 278 (1989) 13

St. Amant v. Thompson, 390 U.S. 727 (1968) 9

State v. Nelson, 210 Kan. 637, 504 P.2d 211 (1972) 15

State Bar v. Semaan, 508 S.W.2d 429 (Tex. Civ. App. 1974), *writ ref'd n.r.e.* 14

State ex rel. Bulloch v. Seier, 771 S.W.2d 71 (Mo. banc 1989), *cert. denied*, 110 S. Ct. 718 (1990) 4-5

State ex rel. Nebraska State Bar Association v. Michaelis, 210 Neb. 545, 316 N.W.2d 46, *cert. denied*, 459 U.S. 804 (1982) 15

State ex rel. Oklahoma Bar Association v. Porter, 766 P.2d 958 (Okla. 1988) 13-14

United States v. Morgan, 313 U.S. 409 (1941) 25

United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 25

Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) 25

Whalen v. United States, 445 U.S. 684 (1980) 5

CONSTITUTIONAL PROVISIONS:

U.S. Constitution Amendment I 2

U.S. Constitution Amendment XIV, Section 1 2

STATUTES:

28 U.S.C. § 1257 1

Revised Statutes of Missouri § 565.004.4 5

Revised Statutes of Missouri § 571.015 4

RULES:

Rule 8.2(a) of the Rules of Professional Conduct adopted effective January 1, 1986 as Rule 4 of the Rules of the Missouri Supreme Court ..... 2,6-8 and *passim*

Rule 8.4 of the Rules of Professional Conduct adopted effective January 1, 1986 as Rule 4 of the Rules of the Missouri Supreme Court ..... 2,7-8 and *passim*

Missouri Supreme Court Rule 5.13 7

Missouri Supreme Court Rule 84.17 1

MISCELLANEOUS:

Annotation, "Attorney's Criticism of Judicial Acts as Ground of Disciplinary Action," 12 ALR 3d 1408 (1967 & Supp.) 15

Epstein, *The Prince of the Podium: Reflections on THE BEST DEFENSE*, 1983 WISC. L. REV. 167 (1983) 19

Hoye, "Silencing the Advocates or Policing the Profession? Ethical Limitations on the First Amendment Rights of Attorneys," 38 DRAKE L. REV. 31 (1988-89). 15

O. Holmes, THE COMMON LAW 35-36 (1881) 24

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OPINIONS BELOW

The opinion of the Missouri Supreme Court (App. 1) is reported at 808 S.W.2d 829. The report of the special master appointed by the Missouri Supreme Court is reproduced at App. 42.

JURISDICTION

The Missouri Supreme Court entered its judgment on May 3, 1991. App. 102. Petitioner timely filed a motion for rehearing on May 20, 1991, pursuant to Missouri Supreme Court Rule 84.17, which the Missouri Supreme Court denied on June 11, 1991. App. 103. This Court has jurisdiction to issue the writ of *certiorari* under 28 U.S.C. § 1257 because petitioner raised and preserved, and the highest court of the state specifically rejected, a federal constitutional claim.

CONSTITUTIONAL AND RULE PROVISIONS INVOLVED

United States Constitution

Amendment I.

Congress shall make no law . . . abridging the freedom of speech . . . .

Amendment XIV, Section 1.

[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Missouri Supreme Court Rule 4, Rules of Professional Conduct

Rule 8.2

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

. . . . .

Rule 8.4

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

. . . . .

(d) engage in conduct that is prejudicial to the administration of justice; . . .

STATEMENT OF THE CASE

Petitioner, George R. Westfall, is a lawyer and, when this case arose, was the elected prosecuting attorney of St. Louis County, Missouri.[1] The Missouri Supreme Court, over the dissent of then Chief Justice, now Judge, Charles B. Blackmar, found Westfall guilty of professional misconduct and reprimanded him for publicly criticizing an appellate court opinion in a widely-publicized case prosecuted by his office. Westfall's comments referred to the authoring judge by name, and were to the effect that the opinion was wrong, result-oriented, rested on reasons that Westfall thought "somewhat illogical" and "even a little bit less than honest," and "distorted" the applicable statute.

1. This case arises out of the prosecution of Dennis Bulloch for crimes committed in connection with the death of his wife, Julia Bulloch. In May, 1986, Julia Bulloch's bound and gagged nude body was found in the burning ruins of her home. Police investigators determined that she had died not from the fire but of suffocation caused by cloth jammed into her mouth and held in place by adhesive tape. Dennis Bulloch was indicted for first degree murder and arson. App. 44. Believing that the case involved murder for financial gain, the prosecution elected to seek the death penalty. Mast. Tr. 26-28.[2]

A trial pertaining only to the charge of first degree murder commenced in May, 1987. Westfall did not personally handle any aspect of the trial; the prosecution was conducted by an attorney in Westfall's office. At trial, Bulloch admitted starting the fire, but asserted that his wife's death had been an accident that occurred during a night of consensual sexual bondage. He

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[1] Westfall was elected County Executive of St. Louis County in November, 1990, and assumed that post on January 1, 1991.

[2] "Mast. Tr." refers to the transcript of the hearing in this case held before the special master on February 23, 1990.

claimed that he panicked after the accident and started the fire to cover up her death. The jury convicted Bulloch only of the lesser included offense of involuntary manslaughter, and he was sentenced to seven years' imprisonment. App. 44. The verdict generated considerable public protest from individuals who believed that Bulloch should have been convicted of first degree murder. Ex. 6.[3]

In July, 1987, the grand jury indicted Bulloch on additional charges of armed criminal action, under R.S. Mo. § 571.015, and tampering with physical evidence. Bulloch sought a writ of prohibition from the Missouri Court of Appeals, asserting that prosecuting him for armed criminal action would unconstitutionally subject him to double jeopardy. The court of appeals entered a provisional writ, and, on August 9, 1988, issued an opinion making the writ permanent, thereby barring the prosecution from going forward. The opinion, signed by Judge Kent E. Karohl on behalf of a three-judge panel, held that a subsequent trial of Bulloch for armed criminal action would constitute double jeopardy.[4] App. 2.

Upon learning of the court of appeals' August 9, 1988, decision, Westfall concluded that it was erroneous as a matter of law. In his view, the Missouri legislature intended that the armed criminal action statute would be available in capital mur-

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[3] "Ex." refers to the exhibits admitted into evidence at the hearing of February 23, 1990 before the special master.

[4] The Missouri Supreme Court upheld the court of appeals' decision. *State ex rel. Bulloch v. Seier*, 771 S.W.2d 71 (Mo. banc 1989), *cert. denied*, 110 S. Ct. 718 (1990). Bulloch subsequently was tried and convicted for second degree arson and tampering with physical evidence, and sentenced to seven years' imprisonment for arson and a consecutive five year term for tampering (the maximum prison terms allowable).

der cases. Yet, while another Missouri statute, R.S. Mo. § 565.004.4, seemed to provide that an armed criminal action charge could not be tried in the same trial as a capital murder charge, the court of appeals now had held that an armed criminal action charge could not be tried in a separate trial. Westfall viewed the court of appeals' decision as forcing prosecutors to choose between pursuing the death penalty or armed criminal action, but not both, and as thereby thwarting the legislature's intent. Mast. Tr. 28-29, 54-55; Comm. Tr. 80-81.[5]

Westfall's views on the court of appeals' decision were influenced by the Missouri appellate courts' history, during the early 1980s, of vacating armed criminal action convictions on double jeopardy grounds, which is chronicled in *Missouri v. Hunter*, 459 U.S. 359 (1983), and *State ex rel. Bulloch v. Seier*, 771 S.W.2d 71 (Mo.banc 1989), *cert. denied*, 110 S.Ct. 718 (1990). That history, which Missouri Supreme Court Judge Albert L. Rendlen has characterized as "the strange history of [the Missouri Supreme Court's] failure to follow [*Whalen v. United States*, 445 U.S. 684 (1980)] and [*Albernaz v. United States*, 450 U.S. 333 (1981)]" *(Seier*, 771 S.W.2d at 74), can be viewed as evidencing hostility on the part of the Missouri courts towards armed criminal action charges. When the court of appeals issued its August 9, 1988 decision, Westfall feared that the Missouri courts' historical dislike of the armed criminal action statute was again rearing its head. Mast. Tr. 34, 50-52; Comm. Tr. 61-66, 74-75.[6]

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[5] "Comm. Tr." refers to the transcript of the hearing held by the Advisory Committee on June 1, 1989.

[6] Of course, the dispositive issue in this case is not whether the court of appeals' issuance of the writ of prohibition was right or wrong, but whether Westfall had a right to express his views without being subjected to professional discipline for doing so.

The day of the court of appeals decision, a local television station sought out Westfall and interviewed him concerning his views on the decision. Mast. Tr. 29. The interview was videotaped and portions of it were broadcast later that day on the evening news. Westfall's comments, as broadcast, included the following (App. 3):

> . . . The Supreme Court of the land has said twice that our armed criminal statute is constitutional and that it does not constitute Double Jeopardy.
>
> . . . .
>
> . . . but for reasons that I find somewhat illogical, and I think even a little bit less than honest, Judge Karohl has said today that we cannot pursue armed criminal action. He has really distorted the statute and I think convoluted logic to arrive at a decision that he personally likes.
>
> . . . .
>
> The decision today will have a negative impact on all murder one cases pending in Missouri, in the future in Missouri, and some that are already on appeal with inmates in prison. So it's a real distressing opinion from that point of view.
>
> . . . .
>
> But if it's murder first degree and we're asking for death, which, of course, is the most serious of all crimes, Judge Karohl's decision today says we cannot pursue both. And that, to me, really means that he made up his mind before he wrote the decision, and just reached the conclusion that he wanted to reach.

2. On January 31, 1989, as a result of Westfall's remarks, the Advisory Committee of the Missouri Bar charged Westfall with professional misconduct in violation of Rules 8.2(a) and

8.4(a) and (d) of the Missouri Rules of Professional Conduct, Missouri Supreme Court Rule 4.[7] The charge focused exclusively on Westfall's televised statements regarding Judge Karohl's opinion for the appellate court. Following a hearing, the Advisory Committee found probable cause to believe that Westfall was guilty of the misconduct charged, but concluded that the matter could be adequately addressed by a private written admonition. The Committee proposed that the matter be resolved on that basis but Westfall exercised his right to reject the admonition. The Committee then filed an information with the Missouri Supreme Court, triggering a formal original disciplinary proceeding in that court. App. 1, 3-4, 37-39. *See* Missouri Supreme Court Rule 5.13.

3. The Missouri Supreme Court appointed a special master who heard further testimony and rendered a report. App. 42. The special master concluded that Westfall had violated Rules 8.2 and 8.4. App. 73-74, 95-98. He found that the statements made by Westfall which were broadcast on television (1) "certainly convey to the average television viewer, and to a lawyer viewer that the judge has done something wrong" (App. 59); (2) "certainly imply an intentional violation of the Supremacy Clause and the above canons [Code of Judicial Conduct] for 'dishonest reasons [and] . . . thus imply a lack of integrity and misconduct" (App. 60); and (3) leave "the ordinary viewer . . . to infer that the dishonest reasons may have involved bribery, coercion, or intimidation, or some personal connection between the judge and some party in the case" (App. 61). The special master stated that "[e]ven if this was not the meaning that [Westfall] intended

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[7] Rules 8.2(a) and 8.4(a) and (d), quoted at the outset of this petition, are drawn verbatim from the American Bar Association Model Rules of Professional Conduct.

to convey," that was no defense because he "assumes the risk of being misunderstood by the ordinary hearer of his publications." *Id.*[8]

The special master rejected Westfall's First Amendment defense. App. 74, 97-98. He concluded that Westfall's own subsequent testimony that he had not intended to impugn the personal integrity of the judge, whom he believed to be a "fine judge," showed both that Westfall's statements were false and that he knew the statements to be false. App. 65-66. The special master recommended that Westfall be suspended from the practice of law for one year, but that the order of suspension be stayed in favor of a public reprimand and one year's probation on the conditions that Westfall obey the disciplinary rules and publicly apologize to Judge Karohl. App. 101.

4. The Missouri Supreme Court reviewed the special master's report *de novo* and agreed that Westfall had violated Rule 8.2(a) of the Missouri Rules of Professional Conduct. App. 1-7. The court also concluded that Westfall had violated Rule 8.4 because "[t]he charges brought under Rule 8.4 are encompassed within the violation of Rule 8.2(a) in this case and, for purposes of imposition of discipline, cannot be distinguished." App. 18. The court publicly reprimanded Westfall and ordered him to pay the costs of the proceedings. *Id.*

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[8] Although the original Advisory Committee charge and ensuing information focused exclusively on Westfall's televised statements regarding Judge Karohl's opinion for the appellate court and on Rules 8.2 and 8.4, the special master also addressed other public statements that Westfall had made concerning the jury verdict in the Bulloch case and the disciplinary proceedings against him. App. 84-90, 93-97. The Missouri Supreme Court, however, specifically declined to consider those further charges, confining itself "only [to] those charges contained in the original information." App. 4. Accordingly, none of those other allegations and charges is before this Court.

The court also rejected Westfall's First Amendment defense. App. 7-17. It acknowledged that for professional discipline based on criticism of a judge to pass constitutional muster, the criticism must have consisted of false statements made with "actual malice," *i.e.*, knowledge or reckless disregard of their falsity. App. 13. As to the test for reckless disregard, however, the court declined to apply the subjective standard set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which requires a determination that the speaker "in fact entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), or had a "high degree of awareness of [his statement's] probable falsity," *Garrison v. State of Louisiana*, 379 U.S. 64, 74 (1964). The court held, instead, that the proper test for reckless disregard in professional disciplinary proceedings is "an objective one dependent on what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." App. 14-15, citing *In re Disciplinary Action Against Graham*, 453 N.W.2d 313 (Minn.), *reinstatement granted sub nom. In re Reinstatement of Graham*, 459 N.W.2d 706 (Minn.), *cert. denied sub nom. Graham v. Wernz*, 111 S.Ct. 67 (1990).

The court acknowledged that "[i]n defamation actions the standard has consistently been a subjective one," but concluded that "[t]he objective standard survives first amendment scrutiny in light of the compelling state interests served" by professional disciplinary rules governing the practice of law. App. 13-15. Applying the objective standard, the court concluded that Westfall acted with reckless disregard because, before making his comments, he "failed to investigate to determine whether Judge Karohl had participated in any cases involving the armed criminal action issue, authored any opinions on the subject, or expressed any personal opinions about it." App. 16.

5. Chief Justice Blackmar dissented on constitutional and other grounds. App. 21. He concluded that the holding and rationale of *New York Times Co. v. Sullivan* fully apply in lawyer disciplinary proceedings directed at criticism of judges outside of courtroom proceedings. He noted that the basis of the majority's finding of recklessness — Westfall's "failure to think things through or to study the case law" — does not meet the standard for recklessness set forth in this Court's decisions in *St. Amant* and *Garrison*. App. 35. The dissent further faulted the majority for using Westfall's testimony "that he did not mean to impugn the integrity of Judge Karohl, and that he did not believe . . . that the judge was not honest" "as indication that [Westfall] acted 'with reckless disregard as to the truth or falsity of the statements.'" App. 34. Chief Justice Blackmar stated that "[i]n assigning an unwarranted construction to Rule 8.2, the Court commits the classic First Amendment sin of overbreadth." App. 36.

REASONS FOR GRANTING THE PETITION

The decision of the Missouri Supreme Court is wrong, inconsistent with decisions of this Court, and conflicts with decisions of other state supreme courts. Like *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (1991), this case presents an important federal constitutional issue regarding the application of the First Amendment to lawyer disciplinary proceedings which warrants this Court's review. Moreover, because this case raises legal issues distinct from those addressed in *Gentile*, this Court's plenary review is appropriate now, without first asking the Missouri Supreme Court to reconsider its ruling in light of this Court's intervening decision in *Gentile*.[9]

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[9] Alternatively, the Court should grant the petition, vacate the judgment below, and remand for the Missouri Supreme Court's reconsideration in light of *Gentile*.

1. This Case Presents an Important, Unresolved and Frequently Recurring First Amendment Issue on Which State Supreme Court Decisions Conflict.

This case raises the issue of whether the "actual malice" test articulated by this Court in *New York Times Co. v. Sullivan* — particularly the "reckless disregard" component of that test — applies in disciplinary proceedings brought against a lawyer for criticizing a judge. Underlying that issue is the question of how First Amendment interests in permitting lawyers to speak freely about matters peculiarly within their knowledge, and permitting the public to hear such speech,[10] should be accommodated with state interests in protecting the reputations of courts and judges.

This Court never has directly addressed the applicability of *New York Times Co. v. Sullivan* in lawyer disciplinary proceedings. The Court has considered whether the *New York Times* rule applies to lawyer criticism of judges in the context of a criminal libel prosecution, and held that it does. *Garrison v. State of Louisiana, supra.* In *Gentile v. State Bar of Nevada*, the Court addressed the extent to which the First Amendment bars professional discipline of a lawyer for making extra-judicial comments which pose a danger of materially prejudicing a pending adjudicative proceeding. Unresolved, however, is how the First Amendment applies in lawyer disciplinary proceedings where the crux of the charge is criticism of a judge or a judge's opinion and there is no issue of the criticism materially prejudicing a pending adjudicative proceeding.

As the Missouri Supreme Court expressly acknowledged below, its adoption of what is, in effect, an objective negligence standard for the "reckless disregard" component of "actual

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[10] The First Amendment interests at stake here are not only the rights of lawyers to speak freely, but also the rights of the public to hear what lawyers have to say. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).

malice" in lawyer disciplinary proceedings conflicts with decisions of other state supreme courts addressing the same issue. App. 14. At least three other state supreme courts have endorsed the applicability of the traditional *New York Times* subjective standard for actual malice in determining whether critical comments made by a lawyer about a judge are entitled to First Amendment protection in professional disciplinary proceedings.

In *Committee on Legal Ethics v. Douglas*, 370 S.E.2d 325 (W.Va. 1988), the West Virginia Supreme Court reviewed disciplinary charges brought against a lawyer based on public statements that he had made against two judges that were allegedly "prejudicial to the administration of justice." 332 S.W.2d at 326, quoting DR 1-102(A)(5). The court concluded that "most criticism of the court system, its procedures, or judges would be a matter of public or community concern and would, therefore, enjoy First Amendment protection under [*Pickering v. Board of Education*, 391 U.S. 563 (1968)]." 370 S.W.2d at 332. The court further held that "the Free Speech Clause of the First Amendment protects a lawyer's criticism of the legal system and its judges." *Id.* While the state supreme court also acknowledged that such protection is "not absolute," and did not apply to defamatory statements, the court concluded, unlike the Missouri court here, that the scope of that exception in lawyer disciplinary proceedings is defined by "the defamation standard for public officials found in *Sullivan v. New York Times*." *Id.*[11] *See also Committee on Legal Ethics v. Farber*, No. 19909 (W. Va. June 27, 1991), 1991 WL 113077.

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[11] Because the disciplinary proceedings under review in *Douglas* had failed to consider "whether the [lawyer's] speech exceeded the scope of [First Amendment] protection," the supreme court remanded for such an inquiry. 370 S.W.2d at 326.

In *State ex rel. Oklahoma Bar Association v. Porter*, 766 P.2d 958 (Okla. 1988), the Oklahoma Supreme Court declined to discipline an attorney for criticizing a federal judge. The court concluded that "[i]n keeping with the high trust placed in this Court by the people, we cannot shield the judiciary from the critique of that portion of the public most perfectly situated to advance knowledgeable criticism, while at the same time subjecting the balance of government officials to the stringent requirements of the *New York Times Co. v. Sullivan, supra*, and its progeny." 766 P.2d at 969. Consistent with *New York Times*, the court construed the state disciplinary rule as not reaching a lawyer's criticism of a judge where "no evidence was introduced to demonstrate that the statements were false or that they were *insincerely* uttered by a speaker having no basis upon which to found them." 766 P.2d at 968 (emphasis added).[12]

In *Ramirez v. State Bar of California*, 28 Cal. 3d 402, 169 Cal. Rptr. 206, 619 P.2d 399 (1980), the California Supreme Court employed reasoning which also is inconsistent with the Missouri Supreme Court's ruling in this case. The court, in *Ramirez*, ultimately ordered that the lawyer charged with misconduct be

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[12] On the other hand, there is also language in *Porter* that might be read as rejecting *New York Times*' applicability. *See, e.g.*, 766 P.2d at 969 ("There is no First Amendment protection for false statements of fact."). Because, however, the court's ruling in *Porter* appears ultimately to turn on the court's determination that the respondent subjectively believed that he had a rational basis for concluding that his remarks were well grounded, the decision is best read as consistent with *New York Times*. The Tennessee Supreme Court appears to agree, having recently referred to the Oklahoma Supreme Court's statement in *Porter* regarding the applicability of *New York Times* in support of the Tennessee court's own conclusion that the First Amendment precluded disciplining a district attorney for critical comments he had made regarding a judge. *See Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116 (Tenn.), *cert. denied*, 110 S. Ct. 278 (1989).

disciplined based on derogatory statements that he made against several judges,[13] but reached that result only after carefully considering whether those comments were entitled to First Amendment protection. 28 Cal. 3d at 402, 169 Cal. Rptr. at 211, 619 P.2d at 404. In considering the First Amendment issue, the court followed this Court's analysis in *Garrison v. State of Louisiana,* which applied the *New York Times Co. v. Sullivan* subjective standard to a criminal libel conviction against an attorney based on his characterization of local judges as lazy and incompetent.[14]

The extent of state court conflict concerning the applicability of *New York Times Co. v. Sullivan* in professional disciplinary proceedings is not confinued to the opinions in this case, *In re Disciplinary Action Against Graham, Douglas, Ramirez* and *Porter.* The New York Court of Appeals recently held that "there must be an objective standard, of what a reasonable attorney would do in similar circumstances," citing *Louisiana State Bar Association v. Karst,* 428 So.2d 406, 409 (La. 1983), and that "[i]t is the reasonableness of the belief, not the state of mind of the attorney, that is determinative." *In the Matter of Holtzman,* 78 N.Y.2d 184, 193 (1991), *petition for cert. filed*

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[13] The lawyer's speech in *Ramirez*, unlike the speech at issue in this case, accused several judges of unlawful behavior, including an allegation that the judges "had been induced to act in an unlawful manner by [the opposing party's] 'power, influence, and money.' " 28 Cal. 3d at 409, 169 Cal. Rptr. at 209, 619 P.2d at 402. In this case, the Missouri Supreme Court expressly found that Westfall "did not accuse the judge of criminal conduct or of being subject to inappropriate influence." App. 17.

[14] At least two other lower courts have also given some indication that the *New York Times* subjective standard applies in determining whether a lawyer's criticism of a judge is entitled to First Amendment protection in professional disciplinary proceedings. *Eisenberg v. Boardman*, 302 F. Supp. 1360 (W.D. Wisc. 1969); *State Bar v. Semaan*, 508 S.W.2d 429 (Tex. Civ. App. 1974), *writ ref'd n.r.e.*

September 9, 1991. Other state supreme courts appear to have limited even further the reach of *New York Times Co. v. Sullivan* in lawyer disciplinary proceedings, concluding that the First Amendment offers little or no protection against a lawyer being disciplined for criticizing a judge if such criticism runs afoul of professional ethics rules. *See, e.g.,Committee on Professional Ethics and Conduct v. Hurd,* 360 N.W.2d 96, 105 (Iowa 1984) ("a lawyer's right of free speech does not include the right to violate the statutes and canons proscribing unethical conduct"); *State v. Nelson,* 210 Kan. 637, 640, 504 P.2d 211, 215 (1972) ("the *New York Times* case and the supporting line of cases cited by respondent in his brief, are clearly inapplicable to a disciplinary proceeding"). *See also In the Matter of Lacey,* 283 N.W.2d 250 (S.D. 1979); *In re Shimek,* 284 So.2d 686 (Fla. 1973).[15]

The frequency with which the issue has recurred underscores the need for this Court to address and resolve it. Practical considerations also highlight the need for definitive guidance from this Court. In light of the present uncertainty and conflict among state supreme courts, whether a particular lawyer is disciplined for criticizing a judge or a judicial opinion now

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[15] In addition to the cases cited above, *see Polk v. State Bar of Texas,* 374 F. Supp. 784 (N.D. Tex. 1974); *In the Matter of Terry,* 394 N.E.2d 94 (Ind. 1979), *cert. denied,* 444 U.S. 1077 (1980); *In the Matter of Frerichs,* 238 N.W.2d 764 (Iowa 1976); *In the Matter of Johnson,* 240 Kan. 334, 729 P.2d 1175 (1986); *J.C.J.D. v. R.J.C.R.,* 803 S.W.2d 953 (Ky. 1991); *Kentucky Bar Ass'n v. Heleringer,* 602 S.W.2d 165 (Ky. 1980); *State ex rel. Nebraska State Bar Association v. Michaelis,* 210 Neb. 545, 316 N.W.2d 46, *cert. denied,* 459 U.S. 804 (1982); *In the Matter of Raggio,* 87 Nev. 369, 487 P.2d 499 (1971); *In re Hinds,* 90 N.J. 604, 449 A.2d 483 (1982); *In re Donohoe,* 90 Wash. 2d 173, 580 P.2d 1093 (1978). *See generally,* Annotation, "Attorney's Criticism of Judicial Acts as Ground of Disciplinary Action," 12 ALR 3d 1408 (1967 & Supp.); Hoye, "Silencing the Advocates or Policing the Profession? Ethical Limitations on the First Amendment Rights of Attorneys." 38 DRAKE LAW REV. 31 (1988-89).

depends on the happenstance of the state by which the lawyer was licensed to practice law. A lawyer subjected to disciplinary proceedings in either Minnesota or Missouri would currently receive far less First Amendment protection for critical statements made about a judge than would a lawyer in several other states, including West Virginia, Oklahoma, and California.[16] Given that lawyers commonly work for multi-state law firms and legal disputes are frequently national in scope, the practical problems presented by the current confusion in the state courts are not imaginary. They are immediate and substantial.

This case provides an excellent vehicle for addressing and resolving the issues posited above. The Missouri ethics rules involved in this case are identical to the American Bar Association's Model Rules of Professional Conduct and, therefore, are the same as or similar to the ethics rules of most other states. Moreover, there is no real dispute as to any of the material facts of the case. Accordingly, this case squarely and sharply frames the constitutional questions presented.

2. The Decision Below Conflicts with *New York Times Co. v. Sullivan* and its Progeny.

a. The Missouri Supreme Court's refusal to apply the *New York Times Co. v. Sullivan* subjective standard for "actual malice" is incorrect as a matter of law. In *New York Times*, this Court concluded that the First Amendment requires "a federal rule that prohibits a public official from recovering damages for

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[16] Indeed, the level of First Amendment protection that a lawyer would receive would not even depend on the locale in which the statement was made or the location of the judge who was criticized. A lawyer licensed to practice law in Missouri who made a critical remark in West Virginia about a judge in Oklahoma would presumably be subjected to Missouri's diminished First Amendment protection in a disciplinary proceeding brought in that state.

a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'" 376 U.S. at 279. According to the Court, "actual malice" means "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. A mere "finding of negligence in failing to discover the misstatements . . . is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." *Id.* at 288.

In *Garrison v. State of Louisiana, supra*, this Court applied the *New York Times* requirement of a showing of "actual malice" to overturn a criminal prosecution of a district attorney for libel. The district attorney had attributed a large backlog of pending criminal cases to the "inefficiency, laziness, and excessive vacations of the judges." 379 U.S. at 66. The district attorney had further claimed that the judges' refusal to authorize disbursements for his investigations had hindered his law enforcement efforts. This Court concluded that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." 379 U.S. at 74. The Court, moreover, specifically found that "[t]he reasonable-belief standard applied by the trial judge is not the same as the reckless-disregard-of-truth standard. . . [D]efeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth." *Id.* at 79.

As more recently confirmed by this Court, the "reckless disregard" standard is a "subjective one." *Hart-Hanks Communications, Inc. v. Connaughton,* 109 S.Ct. 2678, 2696 (1989). Unlike the test announced by the Missouri Supreme Court in this case, it "requires more than a departure from reasonably prudent conduct." *Id.* "[T]here must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of . . . probable falsity'." *Id.*, quoting *Garrison*, 379 U.S. at 74.

b. The same considerations that led to the application of the subjective "actual malice" standard in *New York Times* and *Garrison* apply with equal force here. The speech at issue here, like that in *New York Times* and *Garrison*, was critical of the actions of a public official and concerned a matter of substantial public concern. "The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations." *Gentile v. State Bar of Nevada*, 111 S.Ct. at 2724 (Opinion of Kennedy, J.); *see Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1978). Thus, the kind of speech at issue here "lies at the very center of the First Amendment." *Gentile*, 111 S.Ct. at 2724 (Opinion of Kennedy, J.). The Missouri Supreme Court's decision in this case creates the very danger that this Court sought to avoid in *New York Times*: "the possibility that a good-faith critic of government will be penalized for his criticism." 376 U.S. at 292.

Neither the nature of a lawyer disciplinary proceeding nor the needs of the judiciary justify a different rule than that adopted in *New York Times* and applied in *Garrison*. The adverse consequences that a lawyer can suffer in disciplinary proceedings — ranging from reprimand to disbarment — are no less onerous than those flowing from civil or criminal proceedings. As stated by Chief Justice Blackmar in his dissent below, "[p]rofessional discipline can be fully as chilling of expression as can criminal prosecution." App. 31-32.

Judges, moreover, "are supposed to be men of fortitude, able to thrive in a hardy climate." *Craig v. Harney*, 331 U.S. 367, 376 (1947). "Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputation." *New York Times*, 376 U.S. at 273. As the court below acknowledged, "[t]he principle that 'debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement,

caustic, and sometimes unpleasantly sharp attacks on government and public officials' is no less important when the judiciary is involved." App. 11, quoting *Garrison*, 379 U.S. at 75, quoting *New York Times*, 376 U.S. at 270.[17]

Contrary to the Missouri Supreme Court's apparent assumption, stifling criticism of judges is not likely to enhance public respect for the judiciary. Quite the opposite is true. "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion." *Landmark Communications, Inc.*, 435 U.S. at 842, quoting *Bridges v. California*, 314 U.S. 252, 270 (1941). The more likely result of such an effort is to "engender resentment, suspicion, and contempt." *Id.*, quoting *Bridges*, 314 U.S. at 271. *See id.*, quoting *Bridges*, 314 U.S. at 291-92 (Frankfurter, J., dissenting) ("speech cannot be punished when the purpose is simply 'to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed'").

c. In declining to apply the *New York Times* standard in lawyer disciplinary proceedings, the Missouri Supreme Court

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[17] Judges certainly have greater access to channels of effective communication to the public than do private individuals. To be sure, judges may not feel as free as some other public officials to make statements to or through the media, but their power to be heard, and to respond to unfair criticism, remains substantial. They can issue written opinions in cases, which are preserved and widely disseminated in law books and frequently reported on in the popular press. In addition, judges sometimes speak directly to the press in response to criticism. Also, it is not unusual, given the status of the judiciary, for other persons to come to the defense of a judge being criticized. *See, e.g.*, Epstein, *The Prince of the Podium: Reflections on THE BEST DEFENSE*, 1983 WISC. L. REV. 167 (1983) (responding to criticism of federal judge contained in book)

placed undue emphasis on the state's "substantial interest in maintaining public confidence in the administration of justice" and, in particular, the appellate process. App. 12. This interest is weighty, to be sure, but it is no more so than the general need to protect government and its officials from false claims, which already has been taken into account by this Court in fashioning and applying the subjective "actual malice" test in *New York Times* and *Garrison*. *See Landmark Communications, Inc.*, 435 U.S. at 841-42.

Indeed, criticism of the appellate process is hardly the kind of public commentary that warrants diminished First Amendment protection. Westfall's criticism of the court of appeals' August 9, 1988 decision did not address an ongoing adjudicatory proceeding, and thus risk, as in the case of a jury trial, tainting or prejudicing the factfinding process. The object of his criticism was a completed appellate decision. Nor did petitioner's criticism occur in the courtroom itself, where a court undoubtedly possesses heightened authority to regulate the conduct and speech of lawyers before it for the maintenance of proper decorum. Westfall's speech occurred in his own office and was broadcast across the public airwaves. As an elected public official, Westfall had a special responsibility to speak with the news media concerning a matter of public concern within his official responsibilities. *See Gentile v. State Bar of Nevada*, 111 S.Ct. at 2735 (Opinion of Kennedy, J.) (lawyers "hold unique qualifications" and "'are a crucial source of information and opinion,'" quoting *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975)).

d. Contrary to the majority opinion below, nothing in *New York Times* or *Garrison*, or in any other of this Court's precedents, supports the view that the less demanding "reasonable lawyer" test should apply to the kind of lawyer disciplinary proceeding at issue in this case. Virtually all of the cases upon which the Missouri Supreme Court relied were decided before

this Court's decision in *New York Times*. None of those cases, moreover, involved a lawyer's criticism of an opinion authored by a judge for an appellate court.

For instance, the Missouri Supreme Court relied principally on this Court's decision in *In re Sawyer*, 360 U.S. 622 (1959). App.9. At issue in that case was the propriety of a decision to discipline a lawyer for critical comments she made publicly about a trial judge in an ongoing adjudicatory proceeding in which the lawyer served as defense counsel. A majority of this Court concluded that the lawyer's comments could not properly be viewed as a personal attack on a judge warranting disciplinary action. Although Justice Stewart in a separate concurring opinion questioned the plurality's intimations as to the applicability of the First Amendment to such speech, as did the four dissenting Justices, the plurality's reasoning and Justice Stewart's concurrence prevented the Court from reaching the First Amendment issue.

In re Sawyer not only fails to support the Missouri Supreme Court's decision in this case, it serves to buttress Westfall's position. As Chief Justice Blackmar pointed out in his dissent below, the lawyer's comments in *Sawyer* are "much more disparaging and inflammatory than anything in this case." App. 34.[18] Yet, five Justices readily concluded that the evidence in the record was insufficient to support the charge that the lawyer had impugned the integrity of the judge so as to warrant disciplinary action.

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[18] According to a newspaper article excerpted in the Court's opinion, Sawyer reportedly "spoke of 'some rather shocking and horrible things that go on at the trial.' There's 'no such thing as a fair trial in a Smith act case,' she charged. 'All rules of evidence have to be scrapped or the government can't make a case.' " 360 U.S. at 627 n.4.

Also the comments in *Sawyer* concerned an ongoing adjudicatory proceeding. Here, Westfall criticized a judge's legal reasoning set forth in an opinion filed on behalf of an appellate court. This Court in *Sawyer* explicitly acknowledged that such criticism of a judge's work cannot be deemed to impugn a judge's integrity: "If [the trial judge] was said to be wrong on his law, it is no matter; appellate courts and law reviews say that of judges daily, and imputes no disgrace. Dissenting opinions in our reports are apt to make petitioner's speech look like tame stuff indeed." 360 U.S. at 635. Like the lawyer's comments in *Sawyer*, Westfall's criticism cannot be fairly read to say that the judge "was corrupt or venal or stupid or incompetent." *Id.* Nor, contrary to the reasoning of the special master in this case (App. 59-62), can Westfall's comments be so viewed on the theory "that some of the audience would infer improper collusion . . . from a charge of error. Some lay persons may not be able to imagine legal error without venality or collusion, but it will not do to set our standards by their reactions." *Id.*

3. The Decision Below Conflicts With *Milkovich v. Lorain Journal Co.*

The First Amendment also insulates Westfall's comments from sanction, in disciplinary proceedings or otherwise, because they cannot reasonably be viewed as statements of actual fact about an individual that are provable as false. The First Amendment requires that "a statement on matters of public concern must be provable as false before there can be liability under state defamation law." *Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695, 2706 (1990). Where "statements . . . cannot 'reasonably [be] interpreted as stating actual facts' about an individual," the First Amendment bars their proscription. *See id.*, quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). As demonstrated below, none of Westfall's remarks regarding the opinion authored by Judge Karohl is either "provable as false" or

can be "reasonably interpreted as stating actual facts about an individual."[19]

(1) "[F]or reasons that I find somewhat illogical, and I think even a little bit less than honest, Judge Karohl . . .": As Chief Justice Blackmar pointed out in his dissent, "[e]lementary grammar teaches that what [Westfall] suggested were 'a little bit less than honest' were the reasons, not the judge. . . . The coupling of the offensive phrase with 'illogical' is a further demonstration that the respondent is commenting on the reasons." App. 24. Nor does the mere fact that Westfall referred to the judge by name rather than to the "court" transform his comments into impermissible criticism. As further explained by the dissent below, "[t]his is hardly a significant or substantial distinction, in view of our practice, along with almost all American collegial courts, of speaking through opinions prepared by one member and bearing the author's name." App. 26-27.

(2) "He has really distorted the statute and I think convoluted logic to arrive at a decision that he personally likes": To say that a judge has "distorted" a statute or used "convoluted logic" does not amount to a personal attack. Such characterizations of another's reasoning are the routine trappings of the adversary process. They do not assert facts that are objectively provable or disprovable, or purport to make a statement of actual facts about an individual. Likewise, there is nothing untoward in stating that a decision is one that the judge "personally likes." Plainly, judges have personal judicial philosophies. "The very considerations which judges most rarely mention . . . are the

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[19] In First Amendment cases, this Court typically does not defer to the lower court's characterization of the defendant's comments, but instead independently examines the whole record to make sure that the lower court's judgment does not improperly impinge upon freedom of expression. *See, e.g., Milkovich v. Lorain Journal Co.*, 110 S. Ct. at 2695; *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 499 (1984).

secret root from which the law draws all of juices of life[:] . . . the unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to views of public policy in the last analysis." *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2404 (1991), quoting O. Holmes, THE COMMON LAW 35-36 (1881). A statement such as the one made by Westfall, which merely acknowledges that basic fact, falls far short of an accusation of corrupt or improper judicial behavior.

(3) "Judge Karohl's decision today says we cannot pursue both. And that, to me, really means that he made up his mind before he wrote the decision, and just reached the conclusion that he wanted to reach.": The thrust of this remark, at worst, was that the decision was result-oriented. It is no more damning than Westfall's statement that the decision was one that the judge "personally likes." In addition, as Chief Justice Blackmar pointed out (App. 26-27), Westfall's suggestion that the judge "made up his mind before he wrote the decision" reflects a "realistic analysis of the decisional process." Judges routinely decide what the result in a case will be before drafting the court's opinion. Moreover, where, as in this case, the appellate tribunal previously had taken the extraordinary step of issuing a preliminary writ of prohibition, Westfall's assumption that the court had been predisposed against the prosecution's position in subsequently deciding whether to make that writ permanent likely was an accurate assessment. In any event, such an assessment is not tantamount to accusing a judge of corrupt or improper judicial conduct.

That Westfall might have chosen his words more carefully or used milder language does not remove his remarks from the full protection of the First Amendment. As this Court recently noted in *Milkovich v. Lorain Journal*, 110 S.Ct. at 2706, the *New York Times* culpability requirements are intended to ensure "that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much

to the discourse of our Nation" (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 53-55 (1988)). In fact, the use of loose, figurative or hyperbolic language tends to negate any impression that the speaker's message is the literal meaning of his words. *See, e.g., Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, 398 U.S. 6 (1970) (liability cannot be predicated on notion that word "blackmail" implied that developer committed actual crime); *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974) (the word "traitor" in literary definition of union "scab" does not support defamation action under federal labor law).

By his remarks, Westfall "merely indulged in a practice familiar in the long history of Anglo-American litigation, where unsuccessful litigants and lawyers give vent to their disappointment in tavern or press." *United States v. Morgan*, 313 U.S. 409, 421 (1941). Moreover, lawyers, legislators, law professors, judges, public officials and candidates for public office routinely make such negative statements about viewpoints with which they disagree without being hauled up on ethics charges.[20]

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[20] *See, e.g., United Steelworkers of America v. Weber*, 443 U.S. 193, 222 (1979) (dissenting opinion of Rehnquist, J.) ("Thus, by a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, 'uncontradicted' legislative history and uniform precedent . . . ."); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3067 (1989) (opinion of Blackmun, J. concurring in part and dissenting in part) ("Never in my memory has a plurality announced a judgment of this Court that so foments disregard for the law and for our standing decisions. Nor in my memory has a plurality gone about its business in such a deceptive fashion.") A broader set of illustrations drawn from judicial opinions, scholarly works and the press, quoting judges, academics and other lawyers, is set forth in the Appendix to this petition at pp. 104-10.

In its misguided effort to insulate judges from public criticism, the Missouri Supreme Court threatens to chill this important and traditional kind of political speech, which is essential for public oversight of the judicial process. "[T]he criminal justice system exists in a larger context of a government ultimately of the people, who wish to be informed about happenings in the criminal justice system, and, if sufficiently informed about those happenings might wish to make changes in the system." *Gentile v. State Bar of Nevada*, 111 S.Ct. at 2742. Moreover, characterizations of opponents' arguments or disappointing court rulings as "illogical," "convoluted," or even "dishonest" inject an emotional spark into the adversary process. Under the Missouri court's ruling, the passion of the advocate for a particular position would be replaced by a false deference to authority which would deprive the adversarial system of its emotional force.

Finally, it is no mere coincidence that this case involves a public prosecutor. Like many judges,[21] public prosecutors typically are elected officials. As such, like the petitioner in this case, they often are expected to speak out on matters of public concern within the sphere of their official responsibilities. The significance and correctness of a court decision in a widely-publicized case handled by a prosecutor's office certainly are appropriate matters for comment. Thus, public prosecutors are

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[21] In Missouri, appellate judges are appointed by the Governor and periodically stand for retention elections. Moreover, most Missouri trial judges are elected through partisan elections. This elective attribute of the judicial office makes it particularly important to encourage free debate about judges' conduct of their offices.

especially at risk as a result of the Missouri Supreme Court's decision.[22]

4. *Gentile v. State Bar of Nevada* Weighs in Favor of Granting *Certiorari* and Undertaking Plenary Review.

Finally, this Court's decision in *Gentile v. State Bar of Nevada*, handed down after the Missouri Supreme Court's decision below, supports review in this case.

At issue in *Gentile* was the scope of First Amendment protection due a lawyer subjected to state disciplinary proceedings based on critical comments he made regarding an ongoing adjudicatory proceeding. A majority of the Court concluded that the state's disciplinary action was constitutionally infirm because the underlying court rule was void for vagueness. A different majority of this Court concluded, however, that a "constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials" permitted a state to restrict speech by a lawyer participating in a pending trial where there is a "substantial likelihood of material prejudice" from that speech. 111 S.Ct. at 2745.

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[22] The implications of this decision are not confined, however, to either elected prosecutors or state and local prosecutors. Federal prosecutors typically are embroiled in local controversies, and state and local judges not infrequently are involved. Were federal prosecutors to be subjected to disciplinary proceedings for critical comments regarding a judge, such proceedings could seriously disrupt the work of those officials. For this reason, the Court may wish to seek the views of the Solicitor General concerning whether *certiorari* is warranted. The Solicitor General participated as *amicus curiae* in *Gentile*, which, like this case, concerned the application of the First Amendment to a state lawyer disciplinary proceeding. At the very least, the Solicitor General's participation in *Gentile* reflects the potential importance to the United States of the First Amendment issues presented by this case.

The Court in *Gentile* carefully confined its reasoning regarding diminished First Amendment protection for lawyers to the special problems presented by speech directed to a pending adjudicative proceeding, and particularly the possible prejudicial impact that such speech could have on the jury's factfinding process. The Court stressed that the rule at issue in that case "imposes only narrow and necessary limitations on lawyer's speech." 111 S.Ct. at 2745. The "two principal evils" at which those limitations were aimed were: "(1) comments that are likely to influence the actual outcome of the trial; and (2) comments that are likely to prejudice the jury venire." *Id.*

In this case, unlike *Gentile*, Westfall's comments were not directed at a pending adjudicative proceeding. Neither of the potential evils articulated in *Gentile* is implicated where, as here, the lawyer's critical comments address a completed appellate court ruling. In these circumstances, there is no risk of taint to a factfinding process.[23] Westfall's comments are akin to those that would occur following completion of a trial, which this Court in *Gentile* made clear would not be affected by its ruling in that case. *See* 111 S.Ct. at 2745 ("it merely postpones the attorney's comments until after the trial"); *see also id.* at 2742, quoting *Patterson v. Colorado*, 205 U.S. 454, 463 (1907) ("'[w]hen a case is finished, courts are subject to the same criticism as other people . . .'").

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[23] The special master argued that comments by Westfall criticizing the jury's verdict in the original Bulloch murder trial could have been prejudicial to the administration of justice by, for example, intimidating jurors and judges in future criminal cases into convicting criminal defendants in order to avoid public criticism by prosecutors. App. 84-90. However, in addition to the other flaws in this argument, the comments addressed by the special master in this context are not the comments for which Westfall was charged with professional misconduct under Missouri Rules of Professional Conduct 8.2 and 8.4, were expressly not considered by the Missouri Supreme Court and, therefore, are not the subject of this case. *See* note 8, *supra*.

For these reasons, *Gentile* supports Westfall's position in this case. The Court in *Gentile* concluded, in effect, that a lawyer's free speech rights in the context of out-of-court statements relating to a pending case may be restricted only if the speech poses "substantial likelihood of material prejudice" to an ongoing adjudicative proceeding. The Missouri Supreme Court, however, made no such finding in this case.[24] Nor could it have. Westfall's comments did not pertain to a pending adjudicatory proceeding at all. They concerned a completed appellate court ruling.

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[24] The Missouri Supreme Court concluded, without elaboration, that "[r]espondent's conduct was prejudicial to the administration of justice . . . ." App. 17. However, this conclusion is not tantamount to the type of finding required under *Gentile* before restriction of a lawyer's First Amendment rights may be justified. This is evident not only from the absence of any discussion in the Missouri court's opinion of the possibility of such prejudice, but also from the court's limited discussion of the charges under Rule 8.4(d), which proscribes "conduct that is prejudicial to the administration of justice." After devoting virtually all of its opinion to the allegations pertaining to a violation of Rule 8.2(a), the court's sole reference to Rule 8.4 was that "[t]he charges brought under Rule 8.4 are encompassed within the violation of Rule 8.2(a) in this case and, for purposes of imposition of discipline, cannot be distinguished." App. 18.

CONCLUSION

The petition for a writ of *certiorari* should be granted for this Court's plenary review.[25]

Respectfully submitted,

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September 9, 1991

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[25] Because the Court's intervening decision in *Gentile* does not directly address the distinct First Amendment issues presented in this case, the Court need not provide the Missouri Supreme Court with an opportunity to reconsider its decision in this case in light of *Gentile* prior to granting plenary review. Should, however, the Court disagree, we alternatively request that the Court grant this petition, vacate the judgment of the Missouri Supreme Court below, and remand for that court's reconsideration in light of *Gentile*.

91-4293

No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

In Re GEORGE R. WESTFALL,
Petitioner.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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TABLE OF CONTENTS

Page

APPENDIX A - Missouri Supreme Court Opinions

Original Disciplinary Proceeding (Covington, J.) A-1

Concurring Opinion (Seiler, Sr. J.) A-19

Dissenting Opinion (Blackmar, C. J.) A-21

APPENDIX B - Report of Special Master A-42

APPENDIX C - Judgment A-102

APPENDIX D - Denial of Rehearing A-103

APPPENDIX E -

Examples of Negative Commentary A-104

APPENDIX A

Supreme Court of Missouri
en banc

No. 72022

In The Matter of:
GEORGE E. (BUZZ) WESTFALL,
Respondent.

Filed: May 3, 1991

ORIGINAL DISCIPLINARY PROCEEDING

This is an original disciplinary proceeding instituted by the Advisory Committee of the Missouri Bar pursuant to *Rule 5* against respondent George R. (Buzz) Westfall. The information charged respondent with violation of *Rules 8.2(a)* and *8.4(a)* and *(d)* of *Rule 4*, Rules of Professional Conduct, and requested that respondent be disbarred from the practice of law. The Court appointed as Master to hear the proceedings the Honorable Bruce Normile, Judge of the 2nd Judicial Circuit. Judge Normile made findings and recommended that respondent be suspended from the practice of law for one year and that the order of suspension be stayed subject to certain conditions. In a disciplinary proceeding the Master's findings, conclusions and recommendations are advisory in nature. This Court reviews the evidence *de novo*, determines independently the crediblity, weight and value of the testimony of the witnesses, and draws its own conclusions of law. *In re Waldron*, 790 S.W.2d 456, 457 (Mo. banc 1990).

At all times relevant respondent served as prosecuting attorney of St. Louis County and as such was involved in a series of prosecutions of Dennis Bulloch for crimes committed in connection with the death of Bulloch's wife, Julia. Respondent first led the prosecution of Bulloch for murder in the first degree. Bulloch

was acquitted of that charge and found guilty of involuntary manslaughter. He was subsequently indicted on charges of armed criminal action and destroying physical evidence. The trial court denied Bulloch's motion to dismiss the indictment on grounds of prosecutorial vindictiveness and double jeopardy. Bulloch then filed petition for a writ of prohibition in the Missouri Court of Appeals, Eastern District, seeking to bar further prosecution of these charges. The court of appeals issued a preliminary rule in prohibition and subsequently made the writ absolute.

The court of appeals' opinion in the matter, the unanimous opinion of a three-judge panel of the court, was authored by the Honorable Kent E. Karohl. The court held first that the question of prosecutorial vindictiveness involved disputed facts, a matter to be considered on direct appeal if required. Relying on *Missouri v. Hunter*, 459 U.S. 359 (1983), the court also held that a subsequent trial of Bulloch for armed criminal action would constitute a violation of Bulloch's protection under the Double Jeopardy Clause of the Fifth Amendment of the Constitution of the United States.[1] *Missouri v. Hunter* held that where the legislature specifically authorizes cumulative punishment under two statutes, regardless of whether these two statutes proscribe the "same" conduct, it does not violate double jeopardy to impose cumulative punishment under such statutes in a single trial. *Id.* at 679.

On the day the opinion was issued, respondent made remarks that constitute the basis of the information filed in this case. KSDK-TV, Channel 5, an NBC affiliate in St. Louis, broadcast

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[1] This Court granted transfer and made the preliminary rule absolute. *State ex rel. Bulloch v. Seier*, 771 S.W.2d 71 (Mo. banc 1989). The United States Supreme Court denied certiorari. *Missouri v. Bulloch*, 493 U.S. ___, 110 S. Ct. 718 (1990).

videotaped portions of an interview with respondent on the 6:00 p.m. and 10:00 p.m. news programs. Respondent's statement was broadcast as follows:

> . . . The Supreme Court of the land has said twice that our armed criminal statute is constitutional and that it does not constitute Double Jeopardy.
>
> . . . .
>
> . . . but for reasons that I find somewhat illogical, and I think even a little bit less than honest, Judge Karohl has said today that we cannot pursue armed criminal action. He has really distorted the statute and I think convoluted logic to arrive at a decision that he personally likes.
>
> . . . .
>
> The decision today will have a negative impact on all murder one cases pending in Missouri, in the future in Missouri, and some that are already on appeal with inmates in prison. So it's a real distressing opinion from that point of view.
>
> . . . .
>
> But if it's murder first degree and we're asking for death, which, of course, is the most serious of all crimes, Judge Karohl's decision today says we cannot pursue both. And that, to me, really means that he made up his mind before he wrote the decision, and just reached the conclusion that he wanted to reach.

The information filed by the Advisory Committee charges respondent with violating *Rules 8.2(a)* and *8.4(a)* and *(d)*, of Supreme Court *Rule 4*, Rules of Professional Conduct. *Rule 8.2(a)* provides:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Rule 8.4 provides in pertinent part:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the rules of Professional Conduct . . . .
>
> (d) engage in conduct that is prejudicial to the administration of justice . . . .

The Advisory Committee submits that respondent reacted to Judge Karohl's opinion in utter disregard of the truth, of the integrity of the judicial process, and of respondent's obligations with respect thereto. The Committee further submits that respondent engaged in this conduct without investigation of the facts and without factual basis for his statements. The Committee briefed and argued additional violations not contained in the information. This Court will consider only those charges contained in the original information. *See Matter of Smith*, 749 S.W.2d 408, 414 (Mo. banc 1988).

I.

In defense respondent contends that his statements were directed to the court of appeals' opinion and not to the qualifications or integrity of Judge Karohl and thus did not concern the qualifications or integrity of a judge. Respondent also asserts that the statements in question were merely the expression of opinion and, because opinion cannot be false, the statements are not proscribed by *Rule 8.2(a)*.

This Court first addresses respondent's protestations that his statements were merely expressions concerning the soundness of the court of appeals' decision, not statements of actual and provable facts about the judge's integrity. His contentions are not well taken. First, respondent stated that "the Supreme Court of the Land has twice said our armed criminal action statute is constitutional and that it does not constitute Double Jeopardy." Immediately following, respondent stated:

> . . . but for reasons that I find somewhat illogical, and I think even a little bit less than honest, *Judge Karohl* has said today that we cannot pursue armed criminal action. *He* has really distorted the statute and I think convoluted logic to arrive at a decision that *he personally* likes.

(Emphasis added). Later followed this personalized language:

> But if it's murder in the first degree and we're asking for death which, of course, is the most serious of all crimes, *Judge Karohl's* decision today says we cannot pursue both. And that, to me, really means that *he* made up *his* mind before *he* wrote the decision, and just reached the conclusion that *he* wanted to reach.

(Emphasis added.) The statements personalize the judge's conduct and specifically refer to him, his motivation, and his integrity as it relates to his participation in the appellate judicial process.

Respondent contends that his statements plainly reflect subjective opinion and not verifiable factual assertions. Because opinion cannot be "false," he argues, his comments are not proscribed by *Rule 8.2(a)*. In support of this position, respondent would have this Court microscopically examine the subject phrases independent of each other. He also would have this Court accept his after-the-fact characterization that his words, in sum, simply meant that the court of appeals opinion was "intellectually dishonest."

Respondent seeks to obfuscate the issue. He merely creates an "artificial dichotomy" between opinion and fact. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990). In *Milkovich* the Court refused to recognize an artificial dichotomy between opinion and fact, relying instead on whether there was an assertion of objective fact:

> If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.'

Id. at 2705-06.

Respondent's statements clearly imply an assertion of objective fact regarding Judge Karohl's judicial integrity. The Master so found and this Court agrees. Respondent's language at the very least implies that the judge's conduct exhibited dishonesty and lack of integrity and is sufficiently factual to be susceptible of being proved true or false.

Respondent's continued assertion that the statement "a little bit less than honest" was simply another way of saying "intellectually dishonest" is not well taken. This Court acknowledges but does not condone the all too frequent and often imprecise, rhetorical use of the term "intellectually dishonest." In any event, in his attack on the judge respondent does not support his assignment of "dishonesty" by anything other than pointing to the long and tortuous history of armed criminal action in Missouri and expressing his assumption that a Missouri court was again in error. Respondent does not elucidate by suggesting, for

example, precedent or logic that he believes would constitute an "honest" opinion on the subject. He merely points to similar language and comments by other attorneys, including language used by some judges in dissenting opinions. It is not respondent's function, but the appropriate disciplinary committees', to initiate enforcement of the Professional Rules.

II.

Respondent contends that construction of *Rule 8.2* or *8.4* so as to prohibit the comments made would violate both his right to free speech and his listeners' right to know as guaranteed by the First Amendment to the United States Constitution.

It is important to note at the outset that there are no bright lines to guide courts and lawyers in determining standards to impose when balancing the state's right and need to maintain public confidence in the administration of justice with a lawyer's first amendment rights. It is clear, however, that attribution of honest error to the judiciary is not cause for professional discipline. *In re Sawyer*, 360 U.S. 622, 635 (1959). It is also clear that lawyers who make derogatory statements about judges are protected by the First and Fourteenth Amendments to the United States Constitution from imposition of civil and criminal liability unless the statement is made "with knowledge of its falsity or in reckless disregard of whether it was false or true." *Garrison v. State of Louisiana*, 379 U.S. 64, 74 (1964).

What is not clear is whether the same degree of constitutional protection afforded in the civil and criminal arenas is required in professional disciplinary proceedings. The United States Supreme Court has not directly addressed this issue, and the state courts are in disagreement. Many courts disregard a claim of first amendment protection in disciplinary proceedings, holding that free speech does not give a lawyer the right openly to denigrate the court in the eyes of the public. *See, e.g., In re Raggio*, 87 Nev.

369, 487 P.2d 499, 500 (1971). Other courts reject first amendment arguments in holding that an attorney's voluntary entrance to the bar acts as a voluntary waiver of the right to criticize the judiciary. *See, e.g., In re Woodward*, 300 S.W.2d 385, 393-94 (Mo. banc 1957) ("A layman may, perhaps, pursue his theories of free speech or political activities until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canon of Ethics; and if he wishes to remain a member of the bar he will conduct himself in accordance therewith."); *State v. Nelson*, 210 Kan. 637, 504 P.2d 211, 214 (1972). A smaller number of courts hold that lawyers, even as participants in the administration of justice, are entitled to the full protection of the first amendment. *See, e.g., In re Hinds*, 90 N.J. 604, 449 A.2d 483, 489 (1982).

While the Supreme Court has not spoken decisively on the subject, there are several decisions by the Court that provide some guidance in determining standards by which to judge the proper role of the first amendment in disciplinary proceedings. In *Bradley v. Fisher*, 80 U.S. 335 (1872), the Court announced severe restrictions on the right of attorneys to criticize the judiciary: "[T]he obligation which attorneys impliedly assume . . . when they are admitted to the bar, [is to] maintain at all times the respect due to courts of justice and judicial officers. This obligation . . . includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts." *Id.* at 355. The states reacted by codifying legal ethics, culminating in the American Bar Association's issuing the Canons of Professional Responsibility in 1908. Although the Canons demanded an attitude of respect toward the courts, they also recognized the importance of and encouraged attorney criticism of the judiciary. Most judicial decisions under the Canons, however, prohibited attorney criticism without regard to the actual effect of the statement on the public's

confidence in the legal profession. Note, *Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment Rights*, 56 Notre Dame L. Rev. 489, 491-92 (1981).

The Supreme Court next addressed sanctions against attorneys for allegedly disrespectful remarks about the judiciary in *In re Sawyer*, 360 U.S. 622 (1959). Sawyer was a defense attorney in a Honolulu trial of several people charged with conspiracy under the Smith Act. Six weeks after trial began Sawyer spoke at a meeting sponsored by the International Longshoremen's and Warehousemen's Union. Her speech was critical of the proceedings in Smith Act cases: "There is no such thing as a fair trial in a Smith Act case. All rules of evidence have to be scrapped or the Government can't make a case." Upon recommendation of the Bar Association of Hawaii, the Supreme Court of the territory of Hawaii suspended Sawyer from the practice of law for one year for impugning the integrity of the trial judge. *Id.* at 626. The Ninth Circuit affirmed, 260 F.2d 189 (9th Cir. 1958), and the Supreme Court granted certiorari, 358 U.S. 892 (1958).

Justice Brennan wrote the four-judge plurality opinion reversing the Hawaii court. He began by noting that "lawyers are free to criticize the state of the law." *Sawyer*, 360 U.S. at 631. The freedom, however, does not include the right to "suggest any unseemly complicity by the judiciary in the practice." *Id.* at 633. The public attribution of honest error to the judiciary, wrote Justice Brennan, is no cause for professional discipline absent a tendency to obstruct the administration of justice. *Id.* at 635-36. The opinion delivered by Justice Brennan would prohibit only statements that tend to obstruct the administration of justice or impugn the integrity of a judge .

In a separate opinion Justice Stewart concurred in the result only because he found insufficient evidence in the record to support the charge that Sawyer impugned the integrity of the presiding judge. He emphasized, however, that he disagreed

with any intimation in the principal opinion that an attorney may invoke the constitutional right of free speech to immunize himself from even handed discipline for proven unethical conduct. *Id.* at 646 (Stewart, J., concurring). Justice Stewart adhered to the traditional notions of ethical considerations over freedom of speech: "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *Id* at 646-47.

Justice Frankfurter, joined by three other justices, dissented, finding that the record was replete with evidence to support the charge. He went on to address the "strong intimation" of the principal opinion that Sawyer's speech was protected by the first amendment. While Justice Frankfurter recognized that attorneys have certain first amendment rights to criticize judges, he maintained, however, that these rights did not extend to attorneys actively involved in pending litigation:

> Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice. But a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer.

Id. at 666, (Frankfurter, J., dissenting). Focusing on the potential effect of such speech, Justice Frankfurter's opinion apparently would ban all critical speech by attorneys relating to pending litigation. Comment *The First Amendment and Attorney Discipline for Criticism of the Judiciary: Let the Lawyer Beware*, 15 N. Ky. L. Rev. 129, 136 (1988).

The Court shed further light in *Garrison v. State of Louisiana*, 379 U.S. 64 (1964). Garrison, district attorney of Orleans Parish, Louisiana, was convicted of criminal defamation for statements made at a press conference which disparaged the judicial conduct of eight judges of the Criminal District Court of the parish.

The Court first held that the *New York Times* rule applied in criminal as well as civil actions. This rule provides that critics of public officials may not be subjected to civil sanctions unless the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). The *Garrison* court held that "only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions." *Garrison*, 379 U.S. at 74.

These cases and others make clear that speech concerning public officials, including judges, may be protected speech, "[f]or speech concerning public affairs is more than self-expression; it is the essence of self-government." *Id.* at 74-75. *See also Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1978) (A primary purpose of the first amendment is to protect the free discussion of governmental affairs, including the operations of the courts and the judicial conduct of judges.). The principle that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" is no less important when the judiciary is involved. *Garrison*, 379 U.S. at 75, quoting *New York Times*, 376 U.S. at 270.

There are limitations, however, to first amendment protection. Even protected speech may be regulated. Where unbridled speech amounts to misconduct that threatens a significant state interest, the state may restrict a lawyer's exercise of personal rights guaranteed by the Constitution. *See NAACP v. Button*, 371 U.S. 415, 438 (1963). Restrictions on free speech, however, will survive judicial scrutiny only if the limitation furthers an important or substantial governmental interest and is no greater than necessary or essential to the protection of the particular governmental interest involved. *Sable Communications of California,*

Inc. v. F.C.C., 492 U.S. 115 (1989). A determination of whether the conditions have been met necessarily requires a balancing process. *See L. Tribe, American Constitutional Law* § 12-2, at 792-93 (2d ed. 1988). The Court balances the competing considerations of the individual's interest in expressing certain ideas against the government's interests in and justifications for restricting such expression. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 363-65, *reh'g denied*, 434 U.S. 881 (1977).

In undertaking the weighing process, it is necessary to evaluate the nature and importance of the interest of the state sought to be advanced through the restriction of expression. It is clear that the state has a substantial interest in maintaining public confidence in the administration of justice. The interest is not only the litigant's but also the public's. The interest is in the administration of justice by a fair and impartial judiciary. The right to remedy by appeal is part of this system. Consequently, the public's confidence in the appellate process is vital.

Lawyers are an integral part of and essential to the administration of justice. As officers of the court, lawyers do not stand in the shoes of ordinary citizens. *See Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982) ("The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice."); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) ("We recognize that the States have a compelling interest in the practice of professions within their boundaries .... The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' "). Lawyers must execute their professional responsibilities ethically and pursuant to rules, carefully considered, in order to ensure the confidence of both litigants and the public. Statements by a lawyer impugning the

integrity and qualifications of a judge, made with knowledge of the statements' falsity or in reckless disregard of their truth or falsity, can undermine public confidence in the administration and integrity of the judiciary, thus in the fair and impartial administration of justice.

Rule 8.2(a) contemplates and seeks to effect the substantial government interest in administration of justice through a fair and impartial judiciary. It is this substantial state interest that guides this Court in its interpretation of *Rule 8.2(a)*. The comments to the rule also recognize, however, that the public's interest in the proper administration of justice may be served through criticism of the process. The rule, then, is sensitive to the possibility of its chilling effect and will not be interpreted to silence all lawyer criticism of the judicial system. Discipline, if imposed, is imposed not as punishment against the offender, but in protection of the public. *In re Hardge*, 713 S.W.2d 503, 505 (Mo. banc 1986).

Further construction of *Rule 8.2(a)* requires that the term "false or with reckless disregard as to its truth or falsity" be defined. The cases have consistently required subjective knowledge of the falsity of one's statement before sanctions were imposed. There is no one infallible definition of "reckless disregard." *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968). The standard has often been defined as an awareness of the likelihood of the circulation of false information or a high degree of awareness of probable falsity. *See, e.g., id.* at 731. In defamation actions the standard has consistently been a subjective one — the test not being whether a reasonably prudent person would have had serious doubts as to the truth of the publication, but whether the defendant in fact entertained such doubts. *Id.*

It is not clear, however, whether the "with knowledge or in reckless disregard" standard used in defamation cases must be

strictly applied in disciplinary proceedings. *But see Garrison*, 379 U.S. at 73 ("Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood."). Some courts have simply refused to apply the *New York Times* test, holding that it was inapplicable to a disciplinary proceeding. *See Matter of Johnson*, 240 Kan. 334, 729 P.2d 1175, 1180-81 (1986); *Matter of Terry*, 271 Ind. 499, 394 N.E.2d 94, 95 (1979), *cert. denied sub nom., Terry v. Indiana Supreme Court Disciplinary Comm'n*, 444 U.S. 1077 (1980). Other courts have in dicta indicated that the *New York Times* test is applicable in disciplinary proceedings. *See Eisenberg v. Boardman*, 302 F. Supp. 1360, 1362 (W.D. Wis. 1969); *State Bar v. Semaan*, 508 S.W.2d 429, 432-33 (Tex. App. 1974). Some courts appear to apply the *New York Times* test, but it is unclear whether they are applying the same subjective "with knowledge or in reckless disregard" standard. *See, e.g., Ramirez v. State Bar of California*, 28 Cal.3d 402, 169 Cal.Rptr. 206, 619 P.2d 399, 404 (1980).

At least one court has directly addressed the question and concluded that an objective rather than subjective standard should be used. *In re Disciplinary Action Against Graham*, 453 N.W.2d 313 (Minn.), *cert. denied sub nom. Graham v. Wernz*, 111 S. Ct. 67 (1990). *See also Louisiana State Bar Ass'n v. Karst*, 428 So.2d 406, 409 (La. 1983). In *Graham* the Supreme Court of Minnesota held that the proper standard in attorney discipline cases "must be an objective one dependent on what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances. *Id.* at 322. Minnesota's rule is identical to this Court's *Rule 8.2(a)*, and also identical to *Rule 8.2*, American Bar Association Model Rules of Professional Conduct. The *Graham* court noted that *Rule 8.2(a)*, on its face, rejects an absolute privilege for false statements made by a lawyer with reckless disregard for the falsity. The court noted that the rule's language itself is consistent with the consti-

tutional limitations placed on defamation actions by the United States Supreme Court cases of *New York Times* and *Garrison*. *Id.* at 321. The court concluded, however, that because of the interest in protecting the public, the administration of justice, and the profession, a purely subjective standard is inappropriate. *Id.* at 322. Citing the differences between defamation (a personal wrong with a personal redress) and professional discipline (redress of a public wrong) the court decided that attorneys should be held to a higher standard when leveling criticism that may adversely affect the administration of justice.

> This court certifies attorneys for practice to protect the public and the administration of justice. That certification implies that the individual admitted to practice law exhibits a sound capacity for judgment. Where an attorney criticizes the bench and bar, the issue is not simply whether the criticized individual has been harmed, but rather whether the criticism impugning the integrity of judge or legal officer adversely affects the administration of justice and adversely reflects on the accuser's capacity for sound judgment. An attorney who makes critical statements regarding judges and legal officers with reckless disregard as to their truth or falsity . . . exhibits a lack of judgment that conflicts with his or her position as "an officer of the legal system and a public citizen having special responsibility for the quality of justice." Minn. R. Prof. Conduct, Preamble.

Id. This Court agrees with the reasoning and holding of the *Graham* court. The objective standard survives first amendment scrutiny in light of the compelling state interests served.

It remains to determine whether respondent violated the rule. The findings and conclusions of the Master stated that respondent did in fact act with reckless disregard as to the truth or falsity of the statements made regarding Judge Karohl. This Court agrees. When asked about the statement that the judge "made up

his mind before he wrote the decision," respondent testified that he meant "that he'd made up his mind before he got the case," and that his intent was to convey the message that he felt Judge Karohl's opinion was a foregone conclusion. As stated above, respondent asserted that he meant that the opinion was "intellectually dishonest" but when asked to explain how the opinion was dishonest, respondent merely referred again to his view that the "Missouri appellate system has been intellectually dishonest concerning armed criminal action from day one, in that they steadfastly refuse to follow the directives of the highest court in the land . . . and I anticipated the same thing would happen again." Before making these statements about Judge Karohl, respondent failed to investigate to determine whether Judge Karohl had participated in any cases involving the armed criminal action issue, authored any opinions on the subject, or expressed any personal opinions about it.

Without any corroborative evidence, respondent accused Judge Karohl of deliberate dishonesty. He accused the judge of purposefully ignoring the law to achieve his personal ends. His was not an implication of carelessness or negligence but of a deliberate, dishonest, conscious design on the part of the judge to serve his own interests. That respondent now seeks to negate the Master's findings and conclusions by saying that respondent meant only to characterize the court of appeals opinion as being "intellectually dishonest" refutes neither the actual language used by respondent at the press conference nor respondent's failure legitimately to criticize the reasoning and the holding of the court of appeals opinion. Without investigation, however, and knowing the court's inability to respond to accusations of unspoken motive, respondent proceeded to make a publicly televised statement alleging purposefully dishonest conduct. Respondent's conduct reflects a reckless disregard for the truth or falsity of the statements made. This Court has already concluded, *supra*, that respondent's statements imputed lack of integrity and misconduct in the judge's professional work. His

statements were without basis; the court of appeals opinion relied on the teaching of *Missouri v. Hunter*. Respondent's conduct was prejudicial to the administration of justice and reflects adversely on respondent's fitness to practice law. Accordingly, this Court now finds that by reason of this conduct, the respondent violated *Rule 8.2(a)* of the Rules of Professional Conduct.

This Court must now assess an appropriate disciplinary sanction by reason of the misconduct found in this case. Respondent argues that as an elected public official, he was using the only practicable means of communicating with his constituents. It is true that public figures and those speaking on public matters should not be held in fear of retribution for their every word. Respondent is nevertheless subject to the Rules of Professional Conduct and does not enjoy a privilege recklessly to impugn before the public the integrity of the judiciary. While deference is given to the needs of public officials to be free from a chilling effect, the mere holding of public office does not exempt a lawyer from the operation of the Rules of Professional Conduct. Respondent notes that he did not engage in bribery of jurors, subornation of perjury, misrepresentation to a court, or any similar kind of conduct. This is correct. Furthermore, this Court independently notes that respondent did not accuse the judge of criminal conduct or of being subject to inappropriate influence.

The Master noted that respondent has privately stated his belief in the judge's personal integrity and that at the committee hearing respondent reported that he had privately apologized to Judge Karohl before the hearing. The Master found this to be a mitigating circumstance but noted as an aggravating circumstance respondent's failure to make similar public apology and thereby alleviate the damage caused to the court of appeals and the judge. There are other aggravating circumstances. At the time respondent made the statements, the case remained pending. *See Nelson*, 210 Kan. 637, 504 P.2d 211, 215 (1972).

Avenues for complaint were available in the form of a motion for rehearing as well as through the filing of a complaint with the Commission on Retirement, Removal and Discipline. *See Matter of Riley*, 691 P.2d 695, 705 (Ariz. banc 1984); *In re Lacey*, 283 N.W.2d 250, 252 (S.D. 1979). To date, respondent has continuously and steadfastly refused to deviate from his original position, even in the light of subsequent legal proceedings, none of which disturbed either the holding or the reasoning of the court of appeals opinion. As the Master noted, respondent's twenty years' experience as a prosecutor "belies any suggestion that he may have acted inadvertently or mistakenly, but rather that he did so knowingly or recklessly of the damage he would cause. The only apparent conclusion is that the very unusual and sensational aspects of the case afforded him an opportunity of personal publicity and self-aggrandizement which he utilized without reflection upon the serious consequences entailed."

This Court recognizes that it is possible for a lawyer to charge a judge with misconduct more egregious than that charged in the present case. This Court also recognizes that this case involves a matter of first impression and initial construction of *Rule 8.2(a)* and that the purpose of the rule is to protect the public. Under these circumstances, a public reprimand is appropriate.

The charges brought under *Rule 8.4* are encompassed within the violation of *Rule 8.2(a)* in this case and, for purposes of imposition of discipline, cannot be distinguished.

Respondent is reprimanded and directed to pay the costs of these proceedings.

/s/ Ann K. Covington, Judge

Robertson, Rendlen, Higgins, and
Holstein, JJ., concur; Seiler, Sr. J.,
concurs in separate opinion filed;
Blackmar, C. J., dissents in separate
opinion filed. Billings, Jr., not sitting.

SUPREME COURT OF MISSOURI
en banc

No. 72022

In the Matter of:
GEORGE E. (BUZZ) WESTFALL,
Respondent.

Filed: May 3, 1991

CONCURRING OPINION

In my opinion, there is no question but that Mr. Westfall in his television interview maliciously or recklessly made a false statement that Judge Karohl wrote his *Bulloch* opinion to satisfy his own personal views, using less than honest reasons to do so (which opinion, incidentally, in its result necessarily exposed Mr. Westfall's ignorance of the law of double jeopardy, no doubt thereby arousing his pique).

Mr. Westfall's self-serving protestations that he had "respect for Judge Karohl", did not question his personal integrity "in the least" and had never intended to "impugn or question Judge Karohl's personal integrity," made months later, only after disciplinary charges had been filed against him, in no way change the spirit behind what he said about Judge Karohl in the television interview.

Clearly, under any test, Mr. Westfall's conduct is a violation of Rule 8.2(a) for which he deserves discipline. None of the many cases cited in the opinions herein would require otherwise.

My belief is that it is not necessary or desirable to reach any conclusion in this case as to whether the same degree of constitutional protection afforded speech in civil and criminal cases is required in lawyer disciplinary cases.

I concur in the judgment of discipline by reprimand.

/s/ ROBERT E. SEILER, Senior Judge

SUPREME COURT OF MISSOURI
en banc

No. 72022

In the Matter of:
GEORGE E. (BUZZ) WESTFALL,
Respondent.

Filed: May 3, 1991

DISSENTING OPINION

We should proceed very carefully when we are asked to censor or to censure political speech. Words spoken about an opinion by a judge who is subject to the periodic scrutiny of the voters, by an elected prosecuting attorney and potential candidate, relating to an important criminal matter, epitomize political expression.

The words were spoken during an interview with a television reporter. These reporters fire streams of questions, using the responses they deem most newsworthy. These are often the most vivid.[1] Such give and take is a part of the political process, and should not be discouraged by the threat of hypercritical scrutiny.

The interview came the day the criticized opinion was handed down. The respondent was entitled to share his overview of the course of decisions, without detailed legal research, before he spoke with the reporter. Nor was he required to withhold comment until the motion for rehearing was disposed of. An opinion is news when it is handed down. Motions for rehearing

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[1] The principal opinion faults the respondent for asking us to "microscopically examine the subject phrases independent of each other," even though the broadcast consisted of disjointed segments selected by the editors rather than a continuous discourse.

are usually formalities, often sought but seldom successful.[2] There is absolutely nothing in the record indicating that the respondent was trying to bring public pressure on the author of the opinion, or the other judges of his court, to grant a rehearing. He rather assumed a martyred pose in suggesting that the bench was not sympathetic to his aims.

In *State v. Nelson*, 210 Kan. 637, 504 P.2d 211 (1972) the Supreme Court of Kansas declined a request for discipline of an attorney who had criticized a decision of that court, disciplining him, when he was approached by an interviewer shortly after the handdown. The court perceived a "situation replete with emotion and acrimony," and noted "the fact that the statements attributed to the respondent, were generally in broad terms." *Id.* at 217. It took the very practical course of dismissing the petition. It would be wise for us to do likewise.

I do not argue that a prosecuting attorney enjoys superior privileges with regard to political speech. His office simply demonstrates the political nature of his speech. Like rights are necessarily available to his critics. Nor do we have to speculate at this point as to whether a lawyer's privilege of comment is greater in a case involving important public interests than in matters of purely private concern.

At the formal hearing before the Advisory Committee the respondent testified as follows:

> MR. SCULLY: Mr. Westfall, do you think in this particular instance that you could have criticized the opinion of the Appellate Court in a different fashion?

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[2] The motion for rehearing, of course, is a condition precedent to further review. *Rules* 84.17, 83.03.

> A. Sure. I told Judge Karohl this before we came in here, I saw him and I did something I've been wanting to do but I don't see him often, I went over to say good morning to him and if he seemed okay to shake his hand. I said Judge, I want to say to you face-to-face, not to influence the outcome of this hearing but we're here, I did not mean to impune [sic] or to question your personal integrity and I feel badly if that's the inference you drew or your family or some of your friends or colleagues have drawn. My purpose was to criticize the opinion, I still feel it was wrong, I still feel I have the right and obligation to my constituents to say those things and I'll again given a similar situation I may be a bit more cautious to not reflect upon one's personal integrity but that's a tough thing to do and he sort of made it clear that he understood that dealing with the media is tough because they put on what they want to put on so I made that clear to him.

The disposition of this case is solely our responsibility. We owe no deference to any other tribunal. We are the fact finder. There are no significant credibility calls in the master's report, and I find no indication that he did not consider the respondent to be a credible witness. We must also eschew forbidden intrusions on the field of free expression. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984).

A public reprimand is a substantial sanction, which must be administered only in accordance with due process of law. *In re Voorhees*, 739 S.W.2d 178, 180 (Mo. banc 1987), citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 636-37 (1985). The reprimand is a scar on the lawyer's record and, in a case impacting the First Amendment, has an obvious chilling effect on further expression. We are not at liberty to give a lawyer a "chewing" for rudeness or insolence not committed in the presence of the court.

The judgment of reprimand is faulty, first because no violation of Rule 8.2 has been established; second, because the respondent's speech is protected under the First Amendment and Art. I, Sec. 8, of the Missouri Constitution; and, third, because of the oppressive conduct of the Advisory Committee.

1. *There is no Rule Violation*

Rule 8.2 is narrowly drafted, virtually in terms of the standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). There may be no discipline except for a

> statement that the lawyer knows to be false or with reckless disregard of its truth or falsity concerning the qualifications or integrity of a judge.

The rule pointedly makes no reference to disrespect, discourtesy, or similar impropriety. It is directed at calumny; not at indiscreet or extravagant expression. *See Seested v. Post Printing & Pub. Co.*,, 326 Mo. 559, 31 S.W.2d 1045, 1052 (1930); *Diener v. Star-Chronicle Pub. Co.*, 232 Mo. 416, 135 S.W. 6, 9 (1911); *Williams v. Gulf Coast Collection Agency Co.*, 493 S.W.2d 367, 369 (Mo. App. 1973). The evidence does not demonstrate knowing or reckless falsehood as the rule requires.

The most offensive part of the interview states, "for reasons that I find somewhat illogical, and I think even a little bit less than honest, Judge Karohl . . ." Elementary grammar teaches that what the respondent suggested were "a little bit less than honest" were the reasons, not the judg Any contrary conclusion is a distortion of his language. The coupling of the offensive phrase with "illogical" is a further demonstration that the respondent is commenting on the reasons.

The principal opinion seeks to bolster its construction by at least six unsupportable paraphrases of the respondent's actual words. He did not "specifically refer to [the judge's] . . . integrity

as it relates to his participation in the appellate judicial process." There is no "assertion of objective fact regarding Judge Karohl's judicial integrity." There is no implication "that the judge's conduct exhibited dishonesty and lack of integrity . . . ." The statements that respondent "accused the judge of purposefully ignoring the law to achieve his personal ends" or implied "a deliberate, dishonest, conscious design on the part of the judge to serve his own interests," or that his statements "imputed lack of integrity and misconduct in the judge's professional work," are the words of the writer, not the words of the respondent. This treatment of his words highlights the danger in seeking discipline for expressions about public matters and will give great concern to any lawyer, whether holding office or not, or to any law professor who values a law license, about any criticism of a judge or a judicial opinion. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). The United States Supreme Court has frequently reiterated its holding that speech on matters of public concern occupies the "highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quotation omitted). *See also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

Judge Karohl himself apparently did not think that he had been accused of dishonesty. He testified as follows:

In my present opinion of his words this is a criticism of our opinion.

* * *

Q. Well, you know from talking to Mr. Westfall that he certainly meant to criticize your opinion; isn't that correct?

A. I haven't any doubt he was criticizing the opinion from taking all of the words he used.

The principal opinion makes much of the use of "Judge Karohl" rather than "the court." This is hardly a significant or substantial distinction, in view of our practice, along with almost all American collegial courts, of speaking through opinions prepared by one member and bearing the author's name. The later use of the name and of the singular personal pronouns does not, by any reasonable construction, convert a statement about the reasons in an opinion to a statement about a judge's integrity.

Other portions of the interview simply charge that the opinion is result oriented. This assertion is frequently made about judicial opinions, and cannot be found to be a statement of fact. As Justice Holmes was fond of pointing out, judicial opinions are impacted by the judges' inarticulate major premises.[3] Members of the public have the right to comment about their perception of these premises. Some judges may be branded "plaintiff minded," others are "tools of the insurance companies." Some are "law and order" to one segment of the public but "hanging judges" to others. Some are said to be "tyrants;" others "wimps." Characterizations such as these are not the subject of discipline. Nor is there vice in the statement about what the judge "personally likes." All judges have notions about the shape the law should take and hope that their views find favor with their colleagues.

Least supportive of all of the discipline imposed is the statement that "he made up his mind before he wrote the decision, and just reached the conclusion he wanted to reach." Judge Karohl testified that he was one of the members of a writ division which voted to issue a preliminary order in prohibition. Extraordinary writs are grudgingly issued in Missouri, and a judge who votes to issue a preliminary order very likely has a rather strong feeling that relief should be granted. Tentative views are subject to further briefing and oral argument, but writs to stop criminal

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[3] *Lochner v. People of State of New York*, 198 U.S. 45, 76 (1905).

cases are so rare that, when one is issued, the prosecutor has reason for apprehension. The respondent's realistic analysis of the decisional process does not demonstrate a knowing or reckless falsehood.

The historical development of the Missouri law of libel is helpful in demonstrating how allegedly defamatory words should be construed. In many cases over the years it is said that a plaintiff will not be allowed to place a strained and unnatural construction on language in order to support a claim of libel. *Diener v. Star-Chronicle Pub. Co.*, 232 Mo. 416, 135 S.W. 6, 9 (1911); *Thomson v. The Kansas City Star Co.*, 387 S.W.2d 493, 498 (Mo. banc 1965) and *Jacobs v. Transcontinental & Western Air*, 358 Mo. 674, 216 S.W.2d 523, 525 (1948). Innuendo is permissible only if it is fairly supported by the actual words. *Langworthy v. Pulitzer Pub. Co.*, 368 S.W.2d 388, 389 (Mo. 1963); *Swafford v. Miller*, 711 S.W.2d 211, 213-14 (Mo. App. 1986). The principal opinion uses phrases such as "respondent's statements clearly imply" and "respondent's language at the very least implies." To speak in this manner is to concede that the respondent's words do not say what the prosecution would have them say. There is no reason why defamation cases, even though serving a somewhat different purpose, should not be helpful when problems of construction are presented in a disciplinary case.[4]

Missouri, furthermore, has always recognized the distinction between defamatory statements of fact and statements of opinion, not grounded in objective fact. *Henry v. Halliburton*, 690 S.W.2d 775, 786-87 (Mo. banc 1985); *Willman v. Dooner*, 770 S.W.2d 275, 278 (Mo. App. 1989). We respect people's right to express their views, especially on matters of public concern. *Henry v. Halliburton*, 690 S.W.2d at 784-85 (published column

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[4] *See Swafford v. Miller*, 711 S.W.2d 211, 213 (Mo. App. 1986).

and subsequent copy calling life insurance agent, identified in broad terms, "fraud" or "twister" an expression of opinion and not actionable); *Anton v. St. Louis Suburban Newspapers, Inc.*, 598 S.W.2d 493, 499 (Mo. App. 1980) (remark that lawyer engaged in "sleazy" dealings an expression of opinion and not actionable); *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6 (1970) (use of term "blackmail" in characterizing negotiating position of public figure securing zoning variances was neither slander nor libel). The principal opinion asserts that the respondent "seeks to obfuscate the issue" by suggesting a distinction between fact and opinion, quoting from the case of *Milkovich v. Lorain Journal Co.*, ___ U.S. ___, 110 S. Ct. 2695 (1990). With due respect, the obfuscation comes from the principal opinion.

In *Milkovich*, a newspaper published an editorial in which it was strongly intimated that the plaintiff and others had perjured themselves at a public hearing. The Supreme Court said simply that defamatory statements of fact might support a judgment for libel, even though they were prefaced by a phrase such as "in my opinion," if the speaker suggests personal knowledge of the defamatory facts stated. This case is entirely different, for lack of tangible statements of fact. *Milkovich* is consistent with *Restatement (Second) of Torts*, § 566 (1965), with the general principles of Missouri Law as exemplified by our decisions, and with prior Supreme Court cases, which it cites at length. It certainly does not require this Court to abandon the historic distinction between statements of fact and statements of opinion. "[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich*, 110 S. Ct. at 2706 (citation omitted). If we were to abandon the historic distinction we would reject the wisdom of decades.

The proof is also deficient in the required showing that the statement was one which "the lawyer knows to be false or [was made] with reckless disregard of its truth or falsity." Rule 8.2

requires a purpose to cause harm through defamation. *See New York Times*, 376 U.S. at 279-83, and Part 2, *infra*. There is no support for a finding that the respondent had any purpose other than to denounce the opinion. Counsel for the informants, in response to my question at oral argument, said that their strongest case is *In re Sawyer*, 360 U.S. 622 (1959), which the principal opinion discusses at length. For reasons that follow in Part 2, *infra*, the case does not give any support to the result.

Nor is there support for the claim that the statement was "knowingly or recklessly made." "Recklessness" as applied to speech is not the equivalent of "popping off." There must be an intent to injure before there is occasion for the determination of recklessness. There is no showing here of "false statements made with the high degree of awareness of their probable falsity" required by *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), discussed in Part 2, *infra*.

Because we are the fact finder, we should not disregard the respondent's testimony. He agreed that he should have spoken more carefully, and said that other portions of the interview which the newspeople did not see fit to air made his purpose clearer. He stated positively that he had no purpose of questioning the judge's integrity and that he should have phrased his comments in a different way. Distinctions based on whether he said "the court" rather than "Judge Karohl," or "intellectually dishonest" rather than "a little bit less than honest," show no more than negligence, and do not establish recklessness by the standard the law requires. *Garrison v. Louisiana*, 379 U.S. at 79.

No case cited in the principal opinion involves facts even close to this one. Several of the cases cited have assessed discipline when a lawyer has made unequivocal statements charging one or more judges, or judges acting in concert with others, of fraud, corruption or conspiracy in the disposition of particular cases. *Matter of Terry*, 27' [illegible]1. 499, 394 N.E.2d 94 (1979); *Ramirez v.*

State Bar of California, 28 Cal.3d 402, 169 Cal. Rptr. 206, 619 P.2d 399 (1980); *Louisiana State Bar Ass'n v. Karst*, 428 So.2d 406 (La. 1983); *In re Disciplinary Action Against Graham*, 453 N.W.2d 313 (Minn.) *cert. denied sub nom. Graham v. Wernz*, ___ U.S. ___, 111 S. Ct. 67 (1990). These cases are similar to our own opinion in *Matter of Alexander*, ___ S.W.2d ___ (Mo. banc 1991) (No. 73107, decided April 9, 1991), which properly points to the need for protecting the public from a lawyer who makes unfounded accusations for which no support is furnished, even though the lawyer, out of paranoia or other eccentricity, may believe the charges to be true. All involved unsupportable false charges of criminal or conspiratorial conduct, and do not support the holding of this case.

I would commend the approach of such cases as *State v. Nelson*, 210 Kan. 637, 504 P.2d 211 (1972); *State Bar v. Semaan*, 508 S.W.2d 429 (Tex. Civ. App. 1974); *State ex rel. Oklahoma Bar Ass'n. v. Porter*, 766 P.2d 958 (Okl. 1988); *In re Hinds*, 90 N.J. 604, 449 A.2d 483 (1982); and *Matter of Keller*, 213 Mont. 196, 693 P.2d 1211 (1984), in which the courts have recognized that discipline for speech should not lightly be decreed.

I do not admire the respondent for speaking as he did. His remarks could be described as intemperate, disrespectful, discourteous, poorly informed, and with a plethora of similar adjectives. He is an ambitious politician with a penchant for publicity. Perhaps he had a defense reaction to the disappointing verdict in a major case. The informants must still demonstrate violation of a narrowly drawn rule.

2. *The First Amendment Issue*

The respondent places prime reliance on the landmark case of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which held that even false statements are subject to constitutional protection in defamation actions if they concern public issues and public figures. The defamation plaintiff must show malice, which may be found if a false and defamatory statement is wilfully or recklessly made. *Id.* at 279-80. This holding introduces a new element into the law when it is sought to impose sanctions on expression. The holding was made applicable to criminal cases in *Garrison v. Louisiana*, 379 U.S. at 67, 74, demonstrating that the rationale and holding of *New York Times* apply with no less force when the remedy is criminal.

The principal opinion suggests, however, that

> What is not clear is whether the same degree of constitutional protection afforded in civil and criminal arenas is required in professional disciplinary proceedings.

The answer, I submit, is quite clear. Lawyers do not surrender their First Amendment rights when they accept their licenses. *See Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *In re R.M.J.*, 455 U.S. 191 (1982); *reversing Matter of R.M.J.*, 609 S.W.2d 411 (Mo. banc 1980). *NAACP v. Button*, 371 U.S. 415 (1963); *In re Primus*, 436 U.S. 412 (1978). These cases demonstrate that First Amendment rights must be respected in disciplinary actions, and put a substantial burden on the states to show compelling public interest in order to support limitations on freedom of expression. There must be narrowly drawn rules to protect a compelling public interest. The principal opinion suggests that the public interest involved in disciplinary actions supports stricter controls over freedom of expression. *Garrison* refutes this claim, because it too involved the vindication of public rights rather than private rights. Professional discipline

can be fully as chilling of expression as can criminal prosecution.[5]

The principal opinion adduces scanty and obsolescent authority for the proposition that the First Amendment does not apply to, or has limited application to, lawyer discipline cases. Some of the cases are pre-*New York Times* and most are pre-*Bates*. The more recent and better considered cases recognize that First Amendment protection applies with full force.[6] The quotation from our case of *In re Woodward*, 300 S.W.2d 385, 393-94 (Mo. banc 1957) must be read in the light of the numerous intervening Supreme Court decisions demonstrating that courts are seriously limited in sanctioning lawyers for what they say, and that disciplinary rules must consist with the First Amendment.

Bradley v. Fisher, 80 U.S. 335 (1871), decided in interesting historical context, is of no help at all in our present inquiry because it dealt with a personal confrontation between a lawyer and a judge during a recess in a trial. The case involved a damage suit by a lawyer against a judge and presented several issues, none germane to the present inquiry.

The principal opinion finds solace in a Minnesota case, *In re Disciplinary Action Against Graham*, 453 N.W.2d 313 (Minn.), *cert. den. sub nom Graham v. Wernz*, ___ U.S. ___, 111 S. Ct. 67 (1990), which is said to present an "objective" rather than a

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[5] In *Gentile v. State Bar of Nevada*, 106 Nev. 60, 787 P.2d 386 (1991), the Supreme Court of Nevada tried to one-line the First Amendment issue in a disciplinary action involving a lawyer's public statement of his client's innocence of pending charges. The Supreme Court granted certiorari and the case has been argued.

[6] *State ex rel. Oklahoma Bar Ass'n v. Porter*, 766 P.2d 958 (Okl. 1988); *Matter of Keller*, 213 Mont. 196, 693 P.2d 1211 (1984); *In re Hinds*, 90 N.J. 604, 449 A.2d 483 (1982); *State v. Nelson*, 210 Kan. 637, 504 P.2d 211 (1972); *State Bar v. Semaan*, 508 S.W.2d 429 (Tex. Civ. App. 1974).

"subjective" test for the element of knowing and reckless falsehood in disciplinary cases. There a lawyer who lost a case charged the presiding judge with conspiring with others to deprive his client of his rights. At his disciplinary hearing he offered no evidence in support of the charges, but sought to defend on the basis that he believed the charges to be true. The court held that his professed belief could not refute the charge of recklessness. The case is in line with cases cited in Part 1, above, in which lawyers have been disciplined for charging judges with criminal or conspiratorial conduct, and with our recent case of *In re Alexander, supra*, but bears not the slightest similarity to this case.

Lawyers possess First Amendment rights. Before a court can legitimately impose discipline, chilling the First Amendment, the state must articulate a compelling interest. This the Advisory Committee has not done.

In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1978), the Court held that the state's interest in maintaining the confidentiality of judicial disciplinary proceedings did not justify a sanction against a newspaper which published an article about pending proceedings. This also emphasizes that lawyer and judicial discipline must be exercised in a manner consistent with the First Amendment.

Pertinent also is the trilogy of *Bridges v. State of Cal.*, 314 U.S. 252 (1941); *Pennekamp v. State of Fla.*, 328 U.S. 331 (1946); and *Craig v. Harney*, 331 U.S. 367 (1947), in which the Court established a rule that a purpose of maintaining respect for the courts does not justify contempt sanctions such as have been fairly common in the past for criticism of a judge's conduct in a pending case. The Court explained that the right of freedom of speech includes the right to criticize courts. The trilogy suggests that judges must have thick skins and do not require protection from criticism unless there is malicious defamation. First

Amendment interests far outweigh a purpose of "maintaining respect for the courts." *See also Cohen v. California*, 403 U.S. 15, 22-26 (1971).

The Advisory Committee failed to prove that the statement was one which "the lawyer knows to be false or [was made] with reckless disregard of its truth or falsity." Rule 8.2 is embodied in the *New York Times* standard for proving defamation. *New York Times*, 376 U.S. at 279-80. Actual malice denotes a purpose to cause harm through defamation. *Id.* at 279-83.

The principal opinion points out that the respondent testified at the formal hearing that he did not mean to impugn the integrity of Judge Karohl, and that he did not believe, and did not mean to suggest, that the judge was not honest. The informants, incredibly, use this testimony as evidence that he knowingly spoke falsehoods when only a loose tongue is indicated. The principal opinion does not appear to go this far, but seizes on his admissions as indication that he acted "with reckless disregard as to the truth or falsity of the statements . . . ." In so holding, the opinion misses the point of the requirement of scienter.

Contrary to the Committee's position, *In re Sawyer*, 360 U.S. 622 (1959), provides no support for the principal opinion's remarkable conclusion that respondent spoke knowing falsehoods. A majority of the justices found that Sawyer was not charged with and could not be found to have attempted to obstruct the proceedings in an ongoing trial. The majority went on to conclude that her statements, which are much more disparaging and inflammatory than anything in this case, could not properly be construed as a personal attack on the single judge who was hearing the case. The four dissenters called for more deference to the findings of the two lower courts, and suggested that counsel in a pending trial had special responsibilities. The case, far from supporting the discipline imposed here, is at war with the present result.

The principal opinion struggles to find "recklessness," saying:

> It is not clear, however, whether the "with knowledge or in reckless disregard" standard used in defamation cases must be strictly applied in disciplinary proceedings.

Garrison and *St. Amant v. Thompson,* 390 U.S. 727 (1968), provide the answer. Lawyers may not be disadvantaged in their political speech except for compelling reasons.

Respondent's "recklessness" is apparently found in his failure to think things through or to study the case law. But recklessness in First Amendment law is a term of art, not to be casually attributed. In *Garrison*, the Court said, "it is essential that the First Amendment protect some erroneous publications." *Garrison v. Louisiana*, 379 U.S. at 74. "Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood." *Id.* at 73. The United States Supreme Court has explained that in cases concerning public figures and matters of public interest

> reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained *serious doubts as to the truth of his publication.* Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice. (Emphasis supplied).

St. Amant v. Thompson, 390 U.S. at 731 (1968). That case also teaches the negligent failure to investigate does not establish recklessness. *St. Amant v. Thompson*, 390 U.S. at 733. *See also Cervantes v. Time, Inc.*, 330 F. Supp. 936, 938 (E.D. Mo. 1971).

The principal opinion fails to demonstrate that the respondent's utterances meet the standards of *St. Amant* and *Garrison*.[7]

Our own jurisprudence also teaches that recklessness is not lightly to be found. *Glover v. Herald Co.*, 549 S.W.2d 858 (Mo. banc 1977), Seiler, C. J. There a St. Louis alderwoman stated at a meeting of the Board that she had had two abortions. Her name was correctly telephoned to the city desk by a reporter, but the rewrite editor substituted the name of another alderwoman while "working on a deadline." This Court set aside a verdict for the plaintiff, holding that the jury could not properly find reckless conduct under the evidence in the case and because there was no "high degree of awareness on [the editor's] part of probable falsity in what he wrote." *Id.* at 861.

Today this Court fails to heed the federal decisions defining recklessness. In assigning an unwarranted construction to Rule 8.2, the Court commits the classic First Amendment sin of overbreadth. If lawyers are subjected to the whims of particular tribunals, and are unable to determine the limits of their freedom of expression, their protected expressions will be seriously impeded.[8]

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[7] I find astounding the intimation that the respondent should have made any kind of report to the Committee on Retirement, Removal and Discipline, when he stated emphatically that he did not assert or imply any suggestion of judicial misconduct.

[8] *See Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, ___ U.S. ___, 107 S. Ct. 2568 (1987) (invalidating rule which proscribed all First Amendment activities in airport terminal); *Marsh v. Alabama*, 326 U.S. 501 (1946) (trespass statute held not enforceable against distribution of religious literature on streets of company town).

Traditionally, it is the function of courts to define the constitutional and permissible contours of a rule, regulation or statute. Today, however, it is the judiciary, painting with a broad brush, that intrudes on the narrow boundary of a rule already defined through years of Supreme Court jurisprudence.

The *New York Times* principle and the cases applying it represent good law and good policy. Our bill of rights embodies the same values as does the First Amendment. We should not strive for minuscule distinctions in order to discipline a lawyer for speech. The *New York Times-Garrison* principles amply protect the public from defamatory statements by lawyers about judges. We should proceed in the tradition of free speech, which our courts have honored so long.

3. *The Actions of the Advisory Committee*

There is another reason why the proceeding should be terminated without discipline. The Advisory Committee sought to bring the matter to an end after the formal hearing by tendering the respondent a written admonition pursuant to Rule 5.13. This tender necessarily indicated that the Committee was of the opinion that his conduct did not require either suspension or disbarment. Had it concluded that a temporary or permanent separation from the practice was required in the public interest, its offer of a mere admonition would be manifestly irresponsible.

The respondent refused the admonition in a courteous letter stating that "I . . . feel strongly that my conduct was not only professional, but appropriate." This he had the perfect right to do.[9] An admonition is not a trivial matter. It could be used in future disciplinary proceedings.[10] The respondent might believe that, if he accepted the admonition, he would be considered a "prior offender" whose every utterance respecting the judicial system and its personnel would be scrutinized by the bar disciplinary authorities. He should not, at the very least, be subjected

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[9] It is of interest that the admonition in this case was not designed to be strictly private, as is ordinarily the case, but was conditioned on Judge Karohl's being advised about it.

[10] *In Re Kopf*, 767 S.W.2d 20, 22 (Mo. banc 1989).

to additional sanctions for refusing it. The most that he should risk is a formalization of the charges, with no sanction in excess of a public reprimand. An admonition is not an invitation to plea bargain, designed in part to cut down on the burdens of the prosecutor. Its sole purpose is advisory and remedial, in a case in which the respondent's fitness to practice is not questioned.

After the admonition was refused the Committee filed an information praying that the respondent "be disbarred, that his right and license to practice law be canceled and terminated, and that his name be stricken from the roll of attorneys in this state." The message was loud and clear. If a lawyer doesn't say "uncle" when the Advisory Committee offers an admonition, then they'll throw the book. Many accused lawyers would accept admonitions they consider unwarranted rather than subjecting themselves to public prayers for disbarment.

Next, at the hearing before the master, the informants made a highly publicized recommendation for a suspension of three years. This recommendation was confirmed in their brief, and, in oral argument, they asked for a "substantial" suspension. The Committee's recommendation can only be regarded as further attempt at punishment for rejecting the admonition.[11]

But this is not all. The informants argued in their brief, and also before us, that the Court could consider additional charges of rule violation, of which the respondent had no notice, in support of the enhanced sanction they sought. It was then asserted that the respondent's criticism of the original Bullock

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[11] Based on our cases, a recommendation either of disbarment or substantial suspension for this single offense is patently ridiculous, whether or not a reprimand was previously tendered.

jury after the verdict violated Rules 3.6(a) and 3.8(e).[12] Neither of these rules was mentioned in the information. This approach is not only in conflict with our rules; it violates the elementary principles of due process of law. The principal opinion properly states that these additional charges are not being considered, but we should go further. We should tell the Advisory Committee in no uncertain terms that an information in a disciplinary action must set out all of the rule violations the Committee relies on in support of the discipline it seeks. If additional charges are sought an amended information should be tendered. This attempt to proffer additional charges is a further example of chilling tactics.

The tactics of the Committee are appropriate for comment in this case, in which the respondent is being charged for what he said. The principal opinion suggests that the relationship between the First Amendment and lawyer disciplinary proceedings has not been well defined in the case law. If this is so, we should respect those who invoke the First Amendment when they are drawn into court because of what they say. We should not forget the blood that has been shed in defense of free speech. Some defenders may turn out to be wrong and may ultimately suffer sanctions, but they should not be placed in additional jeopardy for seeking judicial determination of their rights as they view them. The Advisory Committee's conduct has a strong potential for chilling freedom of expression. The Court should abate the proceedings, drawing an analogy from findings of prosecutorial misconduct in criminal cases.

There is a further chilling in the intimation in the master's report and in the principal opinion that the respondent should have made some sort of apology on the record, after the filing of

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[12] I am rather shocked by the intimation that a prosecutor might be disciplined because he criticized a jury which returned a full or partial acquittal.

the information. The opinion refers to his "private" statement of confidence in the judge's integrity and his apology at the formal hearing, but then asserts that he has "continually and steadfastly refused to deviate from his original position." I do not understand this at all. After the formal hearing his license was in jeopardy. He should be entitled to make his defense, and public statements outside of the proceedings should surely be discouraged. He explained that he meant no criticism of the judge's integrity. Is the Court suggesting that he should have announced a change in his view of the court of appeals opinion? We have no right to browbeat him in this manner.

The opinion presents a further problem by its repeated suggestions that the respondent has not laid an adequate research foundation for his criticisms of the Karohl opinion.[13] It faults him for pointing only to "the long and tortuous history of armed criminal action in Missouri," and for his not "suggesting precedent or logic that he believes would constitute an 'honest' opinion . . . ." It says that he "failed to investigate to determine whether Judge Karohl has participated in any cases involving the armed criminal action rule," overlooking his participation in the issuance of the preliminary rule. These comments belie the finding of false statement of fact.

Conclusion

Make no mistake about it. The principal opinion chills lawyers' speech about judicial decisions. It invites the speaker to weigh every word. It invites political opponents to scan statements for the least suspicion of a false statement of fact and to publicize the filing of charges for any criticism of a court or a

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[13] *See, e.g., St. Amant v. Thompson*, 390 U.S. at 733 (negligent failure to investigate does not constitute recklessness).

judge, or, for that matter, of any of the other persons protected by Rule 8.2(a), which applies to statements about adjudicatory officers, public legal officers and candidates for election or appointment to judicial or legal office, as well as to judges. The disadvantages of allowing these kinds of complaints far outweigh the advantages. *See NAACP v. Button*, 371 U.S. at 433, warning of the danger inherent in censoring criticism of public issues, as follows:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions leads to . . . 'self-censorship.' . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.

The respondent adduced quite a few statements of other lawyers and judges containing comments about judicial decisions similar to the statements challenged here. The principal opinion testily replies that "It is not respondent's function, but the appropriate disciplinary committees', to initiate enforcement of the Professional Rules." This language portends further disciplinary proceedings against lawyers and judges who express themselves too freely. Many will conclude that it is wise to keep quiet. Lawyers, who have contributed so much to public discussion in the past, should not be severely disadvantaged as compared to other members of the public.

On the whole record, Westfall should be fully discharged of the information.

/s/ Charles B. Blackmar, Chief Justice

APPENDIX B

IN THE SUPREME COURT OF MISSOURI
EN BANC

No. 72022
In the Matter of:
GEORGE R. ("BUZZ") WESTFALL

REPORT OF SPECIAL MASTER

Comes now the Special Master in this case and reports to the Court as follows:

The Advisory Committee of the Missouri Bar Administration has filed its information seeking disciplinary action against Respondent, George R. Westfall. Respondent is a licensed Missouri attorney and is currently the Prosecuting Attorney of St. Louis County, Missouri. The information charges that Respondent made a television press conference attack upon the integrity of the Honorable Kent E. Karohl, a Judge of the Missouri Court of Appeals. The Advisory Committee asserts that Respondent's statement was false or known to be false by the Respondent, and that it constituted professional misconduct.

I.

MATTERS NOT IN ISSUE.

It may be immediately asserted that there are no issues presented in this case concerning certain matters.

A. Both parties agree that there is no issue in this case concerning either the integrity or the competency of Judge Karohl. Respondent has testified that he does not question, and did not intend to impugn in any way, the personal integrity of Judge Karohl by the statements which he made. During these proceedings, Respondent's attorney has characterized Judge Karohl as "a fine lawyer, and a fine judge".

B. Both parties also agree on the following:

A citizen may criticize the government, its actions and policies. Likewise a lawyer is free to criticize the state of the law. *In Re Sawyer*, 360 U.S. 622 (1959). It imputes no disgrace to say a judge is wrong on the law since appellate courts say so regularly. "The public attribution of honest error to the judiciary is no cause for professional discipline" *Id.* at p. 635. The attorney for the Advisory Committee concedes that anyone has the right to disagree with and criticize a court opinion.

A lawyer may even accurately and truthfully attack the integrity or competence of a court or judge if done in a proper tone and through appropriate channels. 7 C.J.S. Attorney and Client, Sec. 23, p. 752.

C. There is no issue presented here concerning "freedom of the press" or the right of the television station to broadcast Respondent's statements. Under the "fair comment" doctrine, the media "has the right fairly and honestly to comment upon a matter of public interest." *Henry v. Halliburton*, 690 S.W.2d 775, 780 (MO Banc 1985). A fair and accurate report by the media of the statement of an officer of the government is privileged. Restatement Second Torts, Sec. 611, Comment d; *Lami v. Pulitzer Pub. Co.*, 723 S.W.2d 458, 459-460 (1986); *Time, Inc. v. Pape*, 401 U.S. 279; *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2nd Cir, 1977).

Since this was a videotaped television interview, there is no question but that the media report was "a fair and accurate account."

II.

THE UNDERLYING CASE

This case arises out of the much publicized prosecution of Dennis Bulloch for crimes committed in connection with the death of his wife, Julia. Respondent has referred to the Bulloch case as "a sensational murder case, perhaps one of the four or five most publicized cases in my twenty years of prosecuting in the St. Louis area." (MBA Ex. 1, p. 68)

In May 1986 Julia Bulloch's bound and gagged body was found in the burning garage of her home in Ballwin, Missouri. An investigation revealed that Julia died not from the fire, but of suffocation caused by two pieces of cloth which were jammed into her mouth and held in place by tape wrapped around her face and over her mouth.

In August 1986, Dennis Bulloch was indicted for first degree murder. A month later, he also was indicted for arson. Bulloch's trial on the murder charge commenced in May 1987. At trial Bulloch testified that his wife died during a drunken night of consensual sexual bondage after he had passed out in the bathroom. The jury evidently believed Mr. Bulloch, acquitted him of murder in the first degree, and found him guilty of involuntary manslaughter. The jury assessed a punishment of imprisonment for a term of seven years.

On June 18, 1986, Bulloch was indicted on charges of armed criminal action and destroying physical evidence. Thereafter Defendant Bulloch, through his attorney, filed Motions to Dismiss, based first on prosecutorial vindictiveness, and second, with respect to armed criminal action on the basis of Double Jeopardy. These motions were denied by the trial court; and Bulloch sought a writ of prohibition in the Court of Appeals seeking to bar the further prosecution of these charges.

On August 9th, 1988, the Court of Appeals issued a Opinion prohibiting the trial court from proceeding with the armed criminal action charge. (Mo. App. E.D. #54859, Aug. 9, 1988) The opinion was written by Judge Kent E. Karohl, and joined by Judges Kelly and Smith. The opinion held first that the question of prosecutorial vindictiveness involved disputed facts and was a matter for the trial courts discretion to be considered, if necessary, on direct appeal; and second, that a subsequent trial of Bulloch for armed criminal action would constitute Double Jeopardy under the Fifth Amendment of the United States Constitution.

On the day the opinion was issued, Respondent was interviewed by the press and made remarks critical of Judge Karohl, which are the basis of the information filed in this case. The interview was videotaped, and portions of it were shown on the six p.m. news and ten p.m. news by KSDK-TV Channel 5, an NBC affiliate television station in St. Louis.

The proceeding in prohibition was subsequently transferred to the Missouri Supreme Court which arrived at the same result as the Court of Appeals and prohibited the further prosecution of the armed criminal action upon the basis of Double Jeopardy. *State ex rel Bulloch v. Seier*, 771 S.W.2d 71 (MO Banc 1989).

In the opinion in *Bulloch v. Seier*, supra, the Missouri Supreme Court held first, that the murder and armed criminal action counts could have been joined and tried together where "the charges arose from the same transaction and relate to acts committed against the same victim". Section 565.004.2 RSMo. 1986. It held secondly, that since "[a]n armed criminal action by definition, incorporates all the elements of the underlying felony", "[t]he two offenses are therefore the same for purposes of relators claim of successive prosecution." Thus where the armed criminal action was exactly the same crime as the underlying felony of murder or involuntary manslaughter, and allowed only

to enhance punishment, a second trial on the same charge would constitute Double Jeopardy under the Constitution. *Illinois v. Vitale*, 447 U.S. 410 (1980), *Brown v. Ohio*, 432 U.S. 161 (1977). Thus the two charges had to be tried in a "single trial". *Missouri v. Hunter*, 459 U.S. 359 (1983).

Respondent did seek review of the Missouri Supreme Court opinion by the Supreme Court of the United States, but review was denied. *Missouri v. Bulloch*, 493 U.S. ___, 110 S.C. 718, 107 L.Ed.2d 738 (1990).

Subsequently, Bulloch was convicted on the arson and tampering charges. However, that conviction was reversed upon appeal upon a finding of prosecutorial misconduct by way of argument to the jury improperly referring to Bulloch's failure to testify in violation of his constitutional rights. *State v. Bulloch* (Mo. App. E.D. #55705, Feb. 13, 1990).

III

A. THE CHARGES OF PROFESSIONAL MISCONDUCT IN THIS CASE

On January 31st, 1989, as a result of Respondent's remarks, the Advisory Committee of the Missouri Bar Association charged Respondent with professional misconduct. A hearing was held before the Eastern Division of the Advisory Committee on June 1st, 1989, and the committee found probable cause to believe that Respondent was guilty of misconduct.

Upon Respondent's rejection of a "written admonition" on August 31st, 1989, the general chairman filed an information in the Supreme Court on behalf of the Advisory Committee of the Missouri Bar, consisting of nine attorneys and two lay members. (Only one attorney member and one lay member are from the St. Louis area.)

The information filed by the Advisory Committee charges Respondent with violating Disciplinary Rules 8.2(a) and 8.4(a)(d) of Supreme Court Rule 4, Rules of Professional Conduct.

Disciplinary Rule 8.2(a) provides:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Rule 8.4 (a) and (d) provides:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of Professional Conduct . . . .

(d) engage in conduct that is prejudicial to the administration of justice;

Respondent's videotaped statement was broadcast on the St. Louis NBC affiliate television statement on August 9, 1988, the day Judge Karohl's opinion was handed down. Respondent's statement was as follows:

> . . . The Supreme Court of the land has said twice that our armed criminal statute is constitutional and that it does not constitute Double Jeopardy.
>
> . . . .
>
> . . . but for reasons that I find somewhat illogical, and I think even a little bit less than honest, Judge Karohl has said today that we cannot pursue armed criminal action. He has really distorted the statute and I think convoluted logic to arrive at a decision that he personally likes.

. . . .

> The decision today will have a negative impact on all murder one cases pending in Missouri, in the future, and some that are already on appeal with inmates in prison. So it's a real distressing opinion from that point of view.

. . . .

> but if it's murder first degree and we're asking for death, which, of course, is the most serious of all crimes, Judge Karohl's decision today says we cannot pursue both. And that, to me, really means that he made up his mind before he wrote the decision, and just reached the conclusion that he wanted to reach.

The Bar states that the Respondent's statement made the specific charges, first, that the judge made up his mind before he wrote the decision; second, that the judge "just reached the conclusion that he wanted to reach"; and third, that the reasons for the opinion were "somewhat illogical"; that the reasons for the opinion were ". . . a little bit less than honest"; that Judge Karohl "has really distorted the statute", and that Judge Karohl "convoluted logic to arrive at a decision that he personally likes".

The Bar submits that Respondent reacted to Judge Karohl's opinion in utter disregard of the truth, the integrity of the judicial process, and of his obligations with respect thereto. And that he did so without any investigation of the facts and without any factual basis for his statements.

B. RESPONDENT'S DEFENSES.

Respondent admits making the statements in issue, but denies that they violated Disciplinary Rules or that they were known to be false or made with reckless disregard of their truth or falsity.

Respondent also raises three affirmative defenses.

1) The first affirmative defense properly points out that the discipline in this case, if any, is within the discretion and authority of the Supreme Court. That is correct and no further discussion is required of this defense.

2) Respondent's second affirmative defense asserts his rights under the free speech clause of the First Amendment to the Constitution of the United States, and under the Constitution of Missouri, Art. I, Sec. 8, "to criticize an opinion of a judge if the remarks are not knowingly false or untrue or otherwise contrary to Rules 8.2 (a) and 8.4 (a)(e) of Rule 4 of the Missouri Rules of Court of the Supreme Court of Missouri."

Respondent also asserts under the free speech defense that his statements were only the expression of opinion which cannot be false or give rise to any issue of truth or falsity. He lastly asserts that his expressed opinions were directed to the Court of Appeals opinion and not to the qualifications or integrity of Judge Karohl; and thus did not violate the Disciplinary Rules.

Your Master considers the "free speech" issues to be central to the determination of this case. They will be considered hereafter in a general discussion and in the analysis made of the specific disciplinary rules involved.

3) Respondent's third affirmative defense asserts that: Respondent represents St. Louis County, Missouri, and has the right to publicly criticize a judge he believes is wrong, just as a private practicing lawyer in the confines of his office has the right to criticize a trial judge's opinion and tell his client that the opinion should be appealed.

In fact a Prosecutor does not represent a "county" or "all of the people" of a county, but rather ". . . he represents the sovereign power of the people of the state". 27 C.J.S. District and Prosecuting Attorneys, Sec. 1, p. 622-23; and he acts in the name of the "State of Missouri". A prosecutors professional decisions

must be based upon the facts of the case as he understands them and upon the law which applies. Those decisions cannot be made upon the basis of discussions with "all of the people".

A prosecutor has "the ability to influence and ensure proper governmental procedure without resort to public opinion". *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 253 (7th Cir. 1975). "The judicial system has the right to expect that its own officers will not make public that which should not reach a juror". Id. at page 254.

A lawyer or a prosecutor must obey the law as provided in the Disciplinary Rules or be subject to discipline for professional misconduct. The third affirmative defense should be denied.

III

ANALYSIS OF FREE SPEECH

A. THE NATURE OF FREE SPEECH

The First Amendment to the Constitution of the United States provides that: "Congress shall make no law . . . abridging the Freedom of Speech." Freedom of Speech is among the fundamental personal rights and liberties protected from impairment by the states by the Due Process clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925). *Stromberg v. California*, 283 U.S. 359. The Missouri Constitution also protects "Freedom of Speech, no matter by what means communicated". MO Const. Art. I, Sec. 8.

Justice Cardozo said that "Freedom of thought and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319 (1937). Free speech is given a "preferred place" as one of the "great, the indispensable democratic freedom secured by the First Amendment." *Thomas v. Collins*, 323 U.S. 516 (1945).

In *Whitney v. California*, 274 U.S. 357 (1927) Justice Brandeis described "freedom to think as you will, and to speak as you think" as a "means indispensible [sic] to the discovery and spread of political truth", and as essential both to "stable government" and to "political change". Id., 375-377.

"At the heart of the First Amendment is the recognition of the phenomenal importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine v. Falwell*, 458 U.S. 46, 50 (1988). "[T]he freedom to speak one's mind is not only an aspect of individual liberty - and thus a good unto itself - but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumer's Union of the United States, Inc.*, 466 U.S. 485, 503-504 (1984).

B. FREE SPEECH AND PUBLIC DEBATE.

The Supreme Court has recognized a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometime unpleasantly sharp attacks on government and public officials. *New York Times Company v. Sullivan*, 376 U.S. 254, 270 (1964). "One of the prerogatives of American citizenship is the right to criticize public men and measures." *Baumgartner v. United States*, 322 U.S. 665, 673 (1944). "The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical to those who hold public office." *Associated Press v. Walker*, 388 U.S. 130, 164.

In *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-746, it was stated:

> "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed if it is the speaker's opinion that gives offense, that consequence is a reason for according a constitutional protection for it is a

central tenant of the First Amendment that the government must remain neutral in the marketplace of ideas."

"The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste on all public institutions." *Bridges v. California*, 314 U.S. 252, 270 (1941).

Thus persons who make derogatory statements about public officials, including judges, are protected by the First and Fourteenth Amendments of the United States Constitution from imposition of civil and criminal liability, unless the statement is made with knowledge that it is false or with reckless disregard of whether it is false or not. *State Bar v. Semaan*, 508 S.W.2d 429, 432 (TX 1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

C. GENERAL EXCEPTIONS TO FREE SPEECH RULES.

The Supreme Court recognizes however that "not all speech is of equal First Amendment importance", and that "[i]t is 'matters of public concern' that is at the heart of the First Amendment's protection." *Dunn and Bradstreet v. Green Moss Builders*, 472 U.S. 749, 759 (1984). The "majestic protection of the First Amendment" does not extend to certain utterances because they "are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

Generally restrictions on free speech can survive judicial scrutiny under the First Amendment only if certain fundamental and stringent conditions are satisfied. First, the limitation must "further an important or substantial governmental interest unre-

lated to the suppression of expression." *Procunier v. Martinez*, 416 U.S. 396, 413 (1974). Second, the restriction must be "no greater than is necessary or essential to the protection of the particular governmental interest involved." Id.

Regulation of speech is generally unconstitutional unless it is shown that the message constitutes a defamatory falsehood, or poses a "clear and present danger" to important governmental interest. Tribe, American Constitutional Law, Second Edition, Sec. 12-2, p. 791-792 (1988). The Court applies the "most exacting scrutiny" to regulations of speech based on its content, and such restrictions are only valid if "necessary to serve a compelling state interest and . . . narrowly drawn to that end." Id. 798-799.

Thus many exceptions have arisen to the blanket protection of the First Amendment. For example, most Americans are familiar with Justice Holmes statement that: "The most stringent protection of free speech would not protect a man in falsely shouting "fire" in a theater and causing a panic." *Schenck v. United States*, 249 U.S. 47, 52 (1919).

There are many other recognized limitations as well. Speech that is "vulgar", "offensive", and "shocking" is not entitled to absolute constitutional protection under all circumstances." *FCC v. Pacifica Foundation*, 438 U.S. 726, 747 (1978). The state can lawfully punish individuals for the use of insulting "fighting words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, supra at page 572. Obscene materials offensive to contemporary moral standards may be controlled. *Roth v. United States*, 354 U.S. 476. Society can protect children from materials available to adults. *Ernoznik v. Jacksonville*, 422 U.S. 205, 212 (1975). Prisoner mail may be censored for limited purposes. *Procunier v. Martinez*, 416 U.S. 396. Publication of troop ship sailings during wartime may be enjoined *Near v.*

Minnesota Ex Rel Olson, 283 U.S. 697, 716 (1931). Child pornography is not protected. *New York v. Ferber*, 458 U.S. 747 (1982).

Although students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate", *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 506 (1969), "[a] school need not tolerate student speech that is inconsistent with its basic educational mission." *Bethel School Dist. #403 v. Fraser*, 478 U.S. 675, 685 (1986); or that would "substantially interfere with the work of the school or impinge upon the rights of other students." *Hazelwood School Dist. v. Kuhlmeyer*, 484 U.S. 260, 271 (1988).

D. DISCUSSION OF OTHER "FREE SPEECH" ISSUES.

1) An important general exception for the purposes of this case is that *defamatory statements* are outside the circle of constitutionally protected speech. *Beauharnais v. Illinois*, 343 U.S. 250 (1952). This exception is critical to the alleged violation of Disciplinary Rule 8.2 and will be discussed in Section IV, Analysis of Disciplinary Rule 8.2

2. There are also general and specific limitations on a lawyer's "free speech". These are related to the alleged violation of Disciplinary Rule 8.4.

IV. ANALYSIS OF DISCIPLINARY RULE 8.2

A. NATURE OF RULE 8.2

As indicated this rule prohibits a lawyer from making a statement, that the lawyer knows to be false or with reckless disregard as to its truth or falsity, concerning the qualifications or integrity of a judge. Essentially it forbids professional misconduct by a lawyer by way of defamation of a judge.

However, The Rules of Professional Conduct encompass "a much broader spectrum of protection" than defamation. *Matter of Terry*, 394 N.E.2d 94, 95 (IN 1979). Although a defamatory statement about a judge may directly affect an individual, it "is not punished for the benefit of the affected person; the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations." Id. Nonetheless an examination of the law of defamation is necessary here to determine 1) if the statements made were improper under Rule 8.2, and 2) if restrictions upon the statements would violate Respondent's constitutional rights of free speech.

The law of defamation and the individual's right to protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty . . . the right is entitled to . . . recognition . . . as a basic of our constitutional system." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) "Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie." *Gertz v. Welch*, 418 U.S. 323, 344 (1974).

There are also constitutional rights beyond freedom of speech and press at work in this area. Both privacy and reputation involve interests of constitutional dimension. When government limits statements about an individual, it does inhibit speech; "but it also vindicates the individual's ability to control what others are told about his or her life." Tribe, American Constitutional Law, Sec. 12-12, p. 861. These rights are breached "with unmistakable force, when one's good name is deliberately and falsely besmirched, doing violence to one's public identity. Not surprisingly, therefore defamation has long been regarded as a form of 'psychic mayhem' not very different in kind, and in some ways more wounding than physical mutilation." Id.

Thus defamation has been classified as wholly outside the scope of First Amendment free speech protection. *Chaplinsky v. New Hampshire*, supra; *Beauharnais*, supra. Chief Justice Rehnquist has observed that "False statements of fact are particularly valueless; they interfere with the truth seeking function of the marketplace of ideas and they cause damage to an individuals reputation that cannot easily be repaired by counter-speech, however persuasive or effective." *Hustler Magazine v. Falwell*, Supra, p. 49. "There is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances societies interest in "uninhibited, robust and wide-open debate in public issues." *Gertz*, supra, 418 U.S. at 340.

Free speech "values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government." White, J. concurring, *Dunn & Bradstreet v. Green Moss Builders*, 472 U.S. 749, 767 (1984).

"The lie, knowingly and deliberately published about a public official" is simply beyond the constitutional pale. *Garrison v. Louisiana*, supra, 379 U.S. at 75.

However to encourage the discussion of public issue, including the conduct of public officials, and to remove the inhibitory effect of the defamation law, the Supreme Court has created a constitutional privilege for good faith critics of public officials. This constitutional guarantee requires that government may not restrict even defamatory falsehoods relating to a public official's conduct unless it is proved "that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964). Disciplin-

ary Rule 8.2 follows these constitutional requirements by requiring that a lawyer's statement about a judge must be known to be false, or be made "with reckless disregard as to its truth or falsity".

One of the reasons for giving public officials less protection than others from critical public comment is that they "... usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater." *Gertz*, supra, p. 344.

However, it may be noted that this rationale does not apply to a judge because he is required to "abstain from public comment about a pending or impending proceeding in any court." Supreme Court Rule 2, Code of Judicial Conduct, Canon 3 A (6). Thus Judge Karohl was not ethically allowed to make any response to Respondent Westfall's charges at the time they were made, or to this date (since the second Bulloch case is still pending in the trial court and may face further appellate review). Part of the rationale for Disciplinary Rule 8.2 is that judges, "not being wholly free to defend themselves, are entitled to receive the support of the bar *against unjust criticism.*" (emphasis added) Ethical Consideration 8-6 of prior Supreme Court Rule 4, Code of Professional Responsibility (effective Jan. 1, 1971-Jan. 1, 1986).

Thus, in order to violate Disciplinary Rule 8.2, Respondent's statements would have to be 1) defamatory, 2) false, and 3) malicious under the New York Times Rule. Even so, Respondent could not be disciplined if his statements were 4) a privileged opinion under "free speech" rules.

B. DEFAMATORY NATURE OF THE STATEMENTS.

1. A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community. Restatement of Torts Second, Sec. 559, *Henry v. Halliburton*, 690 S.W.2d 775 (MO Banc 1985). "Communications are often defamatory because they tend to expose another to hatred, ridicule, or contempt . . . [Or] may tend to disparage another by reflecting unfavorably upon his personal morality or integrity." Restatement, supra, Sec. 559, Comment b.

It is not required that the communication "tend to prejudice the other in the eyes of everyone in the community or of all of his associates, nor even in the eyes of a majority of them. It is enough that the communication would tend to prejudice him in the eyes of a substantial and respectable minority of them, and that it is made . . . in a manner that makes it proper to assume that it will reach them." Restatement, supra, Section 559, Comment e. "This would normally be presumed if the communication was made on television. Prosser and Keeton, The Law of Torts, Sec. 111, p. 772 (Fifth Edition 1984).

In determining whether a statement is defamatory, it is presumed that the persons who heard it understood the words in their ordinary and natural import. 53 C.J.S., Libel and Slander, Sec. 165 a, p. 242. Where a statement is capable of two meanings, one defamatory and one not, it must be determined which of the two meanings would be attributed to it by those to whom it is addressed. *Washington Post Co. v. Chaloner*, 250 U.S. 290 (1918). "The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express." Restatement, supra, Sec. 563. Where the alleged defamatory matter is published publicly to a large number of recipients, it can be presumed that if the publication was ambiguous on its face and could be construed with two reasonable meanings, some recipients would give it a

defamatory construction." Prosser and Keeton, supra, Sec. 111, p. 783.

In this case, Respondent's televised communication stated or implied: 1) That Judge Karohl failed to follow the "Supreme Court of the land" which had held that the armed criminal action statute was constitutional, and that it did not constitute Double Jeopardy.; 2) That Judge Karohl "really distorted the statute . . . to arrive at a decision that he personally likes.; 3) that this was for reasons "a little bit less than honest"; 4) that Judge Karohl "made up his mind before he wrote the decision"; and 5) that Judge Karohl "just reached the conclusion he wanted to reach."

These statements certainly convey to the average television viewer, and to a lawyer viewer that a judge has done something wrong. It certainly disparages a judge and reflects unfavorably upon his morality and integrity. The average lay or lawyer viewer would certainly think less of such a judge.

Because of the wide dissemination of television broadcasting "together with the prestige and potential effect upon the public mind of a standardized means of publication that many people tend to automatically accept as conveying truth", publication of defamatory matter by videotape statements broadcast on television are actionable per se. Restatement, supra, Sec. 568 A, Comment a, Sec. 569. In view of the fact that there are several million people in the St. Louis metropolitan area, it can easily been seen that thousands or hundreds of thousands of viewers may have heard the Respondent's televised statements on the date in question. With resultant harm to him and to the administration of justice.

2. False words which prejudice the person spoken of in his profession or office are actionable per se when they impute fraud, want of integrity, or misconduct in his professional work. *Brown v. Kidderman*, 443 S.W.2d 146, 154 (MO 1969); *Anton v. St. Louis Suburban Newspapers, Inc.*, 598 S.W.2d 493, 496

(Mo. App. 1980); *Smith v. UAW-CIO Federal Credit Union*, 728 S.W.2d 679, 682 (Mo. App. 1987). *Swafford v. Miller*, 711 S.W.2d 211 (Mo. App. 1986). 50 Am Jur 2d, Libel and Slander, Sec. 122 (1970).

Under the Supremacy Clause the Constitution of the United States is "the supreme law of the land; and the judges in every state shall be bound thereby". U. S. Const., Art. VI (2). It is also required that judges be bound by oath to support the Constitution. Id. (3)

Supreme Court Rule 2, Code of Judicial Conduct, Canon 1 finds that "an independent and honorable judiciary is indispensable to justice in our society" and requires that a judge "observe high standards of conduct so that the integrity and independence of the judiciary may be preserved." Canon 2A requires a judge to "respect and comply with the law and . . . conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3A(1) requires a judge to "be faithful to the law, and . . . be unswayed by partisan interest, public clamor, or fear of criticism."

The statements in issue here certainly imply an intentional violation of the Supremacy Clause and the above canons for "dishonest reasons". They thus imply a lack of integrity and misconduct in Judge Karohl's professional work. There was evidence that this was the inference drawn by many viewers of the television report. Respondent testified that he and his associates were contacted by various lawyers who asserted that Respondent had characterized Judge Karohl as being "dishonest". Judge Karohl testified that he received contacts from twenty-five or so lay people, lawyers, and judges who were upset by Respondent's statements.

3. Another aspect of defamation law is implicated here. A statement which falsely imputes criminal conduct to another person is defamatory. *Smith v. UAW-CIO Federal Credit Union*,

728 S.W.2d 679, 682 (Mo App. 1987); *Brown v. Kidderman*, 443 S.W.2d 146, 153 (MO 1969); *Hunt v. Gerlemann*, 581 S.W.2d 913, 914 (Mo App. 1979); Sableman, *The Courts Role in Interpreting Language in Libel and Slander Cases*, 45 Journal of the Missouri Bar, 399, 400. Restatement, supra, Sec. 571. A specific crime need not be charged if the conduct is imputed in general terms. Restatement Torts Second, App., Sec. 571, Comment c, p. 408. (1981).

A defamatory imputation may be made by innuendo, Restatement (1977), supra, Comment c , or by inference, implication, or insinuation. 53 C.J.S. Libel and Slander, Sec. 13, p. 48. Even a lay viewer could figure out and infer that it was unethical or improper for a judge to "distort a statute to arrive at a decision he personally liked", or to make up his mind before he got the case. When the lay viewer is further told that the improper action was done "for reasons that were a little less than honest", there is then an implication of even more sinister conduct. Since no facts were given to support this conclusion, the ordinary viewer would be left to infer that the dishonest reasons may have involved bribery, coercion, or intimidation, or some personal connection between the judge and some party in the case which led him to reach an improper result. The suggestion that a judge may have accepted some benefit to influence his official action in a pending judicial proceeding implies the crime of "acceding to corruption" under Sec. 575. 280 1.(1) RSMo. 1969. Also see Sec. 576.020 RSMo. 1969.

Even if this was not the meaning that Respondent intended to convey, as a member of a skilled calling, he is held to the standard of his craft and assumes the risk of being misunderstood by the ordinary hearer of his publications. *Greenbelt Co-Op Pub. Assn. v. Bresler*, 398 U.S. 6, 23 (White J., concurring) (1970). Professionals must "guard against the possibility that words known to carry two meanings, one of which imputes commission of a crime, might seriously damage the object of their comment in the

eyes of the average [viewer]." Id. In view of the size of the TV audience here, it is evidence that many would infer criminal misconduct from the statement.

4. It is not the intention of the speaker, but the understanding of the hearer, by which defamation is to be determined. 53 C.J.S. Libel and Slander, Sec. 14, p. 50. However the intention of the speaker may, and in this case does, illuminate the defamatory nature of the statements made. Although Respondent's attorney has asserted that the statements made were an attack on the "court opinion" rather than on Judge Karohl personally, Respondent's televised statement and his subsequent testimony are to the contrary.

In this respect it must first be observed that Respondent's statement was specifically addressed to Judge Karohl and not to his "court opinion". Respondent specifically stated that "*Judge Karohl* . . . has really distorted the statute to arrive at a decision that *he personally likes*," . . . that "means that *he made up his mind* before he wrote the decision and just reached the conclusion *he wanted to reach.*"

Secondly, Respondent's subsequent testimony demonstrates that his televised statement was not making reference to Judge Karohl's "court opinion", but to Judge Karohl and his motivation.

a. Respondent testified that it was Judge Karohl's "reasons" rather than his "reasoning" which were less than honest. When asked how the "reasons" were less than honest, Respondent's reply was that he meant "the attitude of the appellate bench historically toward armed criminal action. In my opinion it was Judge Karohl's judicial bent to begin with that is far too liberal to suit me, that I wasn't surprised at all by the result." (T, p. 46).

b. When asked about the statement that the judge "made up his mind before he wrote the decision", Respondent stated that he

meant "that he'd made up his mind before he got the case." (T, p. 34); and that his intent was to convey the message that he felt Judge Karohl's opinion was a foregone conclusion. (T, p. 43).

c. In explaining why he stated that Judge Karohl prejudged the case to reach a result that he personally wanted, Respondent stated that: "I was giving my opinion as to the decision of the overall context historically and recently of the armed criminal action statute, that the appellate judges of this state have repeatedly beat down the armed criminal action statute." (T, p. 48).

d. Respondent also asserts that he meant that the "court opinion" was "intellectually dishonest". However, he did not use that term in the televised interview. Nor did the television reporter recall hearing the term used, or have any recollection that the term was discussed. The reporter also testified that the term was not used on the parts of the videotape which were not used on the televised interview. (MBA Ex. 1, p. 47)

However, when asked to explain how the opinion was "intellectually dishonest", Respondent did not address the opinion at all, but again referred to his view that the "Missouri Appellate system has been intellectually dishonest concerning armed criminal action from day one, in that they steadfastly refuse to follow the directives of the highest court in the land . . . and I anticipated the same thing would happen again." (T, p. 51-52).

5. The history of the armed criminal action cases which frustrated Respondent Westfall is set out in the case of *State Ex Rel Bulloch v. Seier*, supra. That opinion demonstrates that the issues which had frustrated Respondent had been finally decided in 1983 by the United States Supreme Court in *Missouri v. Hunter*, 459 U.S. 359 (1983); and that the Missouri courts had thereafter complied with the decisions of the United States Supreme Court on armed criminal action.

The only criticism that Respondent has made during these proceedings attacking the "reasoning" of Judge Karohl's opinion concerns 1) the result reached, and 2) the dictum that the armed criminal action charge could not have been initially tried with the murder charge.

As to the first criticism: the Fifth Amendment to the U. S. Constitution provides that no one shall be "subject for the same offense to be twice put in jeopardy of life or limb." It is made applicable to the states by the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784, 795 (1969). In 1983 the United States Supreme Court determined that an "armed criminal action" was the "same offense as the associated felony and had to be tried with it in a "single trial". *Missouri v. Hunter,* supra. As noted in *Bulloch v. Seier*, supra, the decisions of the United States Supreme Court in *Illinois v. Vitale*, supra, and *Brown v. Ohio,* supra, had previously determined the issues presented to Judge Karohl.

As to criticism of the dictum, Respondent has since testified that he had the same belief, i.e. that the armed criminal action could not have been initially tried with a murder charge. However, both the dictum and Respondent's view were corrected by the subsequent opinion of the Missouri Supreme Court which held that the armed criminal action charge could have been tried with the murder charge if originally filed with it.

It must also be observed that the dictum had no effect on the outcome of the case under either Judge Karohl's opinion or that of the Supreme Court.

Thus, although Respondent could have charged and tried Defendant Bulloch with armed criminal action, he and his office failed to do so due to misadvertence [sic] or mistake. Respondent testified that he had failed to initially charge armed criminal action with the murder charge because 1) he "hadn't thought of it prior to the trial", (Ex. 6, *State v. Bulloch*, motion hearing, p.

85); 2) he didn't think "armed criminal action" applied to the weapon used (Id. p. 94-95); and 3) he [mistakenly] believed that armed criminal action couldn't be tried with the murder charge. (Id. p. 95).

C. FALSITY OF THE STATEMENT.

Since the statement is found to be defamatory in the sense in which thousands of people would have been expected to understand it, examination must be made as to the truth or falsity of the statement.

In this respect the testimony of Respondent Westfall establishes the falsity of the statement in the defamatory sense. Respondent testified that he did not question Judge Karohl's personal integrity in the least (MBA Ex. 1, p. 66, 83) and that he did not mean to impugn Judge Karohl's personal integrity by the televised statements that he made. (MBA Ex. 1, p. 76, 78-79). Respondent further testified that he had privately apologized to Judge Karohl on the day of the formal hearing before the committee and had advised him that he did not mean to impugn or to question his personal integrity, but only to criticize the opinion. (MBA Ex. 1, p. 79). Respondent also stated that "given a similar situation I may be a bit more cautious to not reflect upon one's personal integrity." (MBA Ex. 1, p. 78-79) Respondent's attorney reported that Judge Karohl "was a fine lawyer and he's a fine judge". (T., p. 15).

At the hearing before the committee Judge Karohl testified that neither he nor the other judges who decided the case had any personal interest or preference in the outcome, and that there were no acts by any of the judges with regard to the management of the case or the preparation of the opinion that were "less than honest". (MBA EX 1, p. 9-10).

Respondent's statement clearly implies that Judge Karohl failed to follow the "Supreme Court of the land" which had held

that "our armed criminal action statute was constitutional and that it did not constitute Double Jeopardy"; and that this was for "reasons less than honest". This implication is false as well. Judge Karohl's opinion did not challenge either of those determinations. The opinion merely held as the "Supreme Court of the land" had held in *Missouri v. Hunter*, supra, that armed criminal action and the associated felony had to be tried in a "single trial".

D. THE REQUIREMENT OF MALICE

The malice required is that the statement be made "that the lawyer knows to be false or with reckless disregard as to its truth of falsity." Disciplinary Rule 8.2, *New York Times Co*, supra.

In defamation cases, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *Time v. Pape*, 401 U.S, 279, 291 (1971). There must be "clear and convincing proof that the defendant has knowledge of, or recklessly disregarded the falsity of the defamatory statement." Tribe, supra, Sec. 12-12, p. 866, *Rosenbloom v. Metro Media Inc.*, 403 U.S. 29, 30 (1971).

In this case Respondent admits that he believed and knew that Judge Karohl was a man of personal integrity. Nonetheless he made the televised statements with the defamatory sense that the judge was unethical, dishonest, or even criminal. His admissions establish that Respondent knew the defamatory statements to be false. Thus Respondent had more than "a serious doubt" as to the truth of the defamatory statements; but rather knew their falsity. This is sufficient to establish a violation of the rule. See *Worley v. OPS*, 686 P.2d 404, 407 (Or App 1984).

Even assuming the possibility that Respondent might not have comprehended the defamatory nature of the statements which he

made, it remains clear that he acted in reckless disregard of the truth or falsity of those statements. "Reckless disregard" is demonstrated by other factors in the case as well.

It is relevant that Respondent had both time and opportunity to investigate the truth of the statement. Restatement, supra, Sec. 580A, Comment d. However, Respondent testified that, before making his critical statement about Judge Karohl, he failed to make any check to see whether Judge Karohl had participated in any cases on armed criminal action, written any opinions on it, or expressed any personal opinions about it. Nor did Respondent check with his staff or any other persons in this respect. (T. p. 43-44). This failure demonstrates Respondent's recklessness since he also testified that he made the critical statements because of previous opinions of other appellate judges.

"Reckless disregard" is also demonstrated by another aspect of the case. As a lawyer Respondent was aware that he should report dishonest behavior of a judge to the Commission on Judicial Discipline and Retirement, which would investigate, and if appropriate, prosecute such misconduct. However without making such a report, without that investigation, and without any investigation of his own, Respondent proceeded to make a publicly televised statement alleging unethical and dishonest conduct.

E. WERE THE STATEMENTS PROTECTED OPINION?

1. Generally the free speech clause of the First Amendment protects the expression of "pure opinions". *Henry v. Halliburton*, 690 S.W.2d 775, 782 (Mo Banc 1985), *Anton v. St. Louis Suburban Newspapers, Inc.*, 598 S.W.2d 493, 498 (Mo App. 1980). 53 C.J.S., Libel and Slander, Sec. 12, p. 45.

Justice Powell wrote for the Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974): "Under the First Amendment there is no such thing as a false idea. However

pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas. But there is no constitutional value in false statements of fact."

In analyzing Justice Powell's meaning in *Gertz* it cannot be overlooked that in his dissenting opinion in *Letter Carriers v. Austin*, 418 U.S. 264, at 297, which was both argued and decided on the same dates as *Gertz*, he argued that while derogatory opinions about "scabs" in general were protected, the speakers had "specifically impugned" the character of the plaintiff in the case and were therefore subject to suit. Justice Powell stated in *Letter Carriers*: "It is one thing to say that lawyers are shysters and that doctors are quacks, but it is quite another matter — indeed, it is libelous per se — to publish that lawyer Jones is a shyster or that Dr. Smith is a quack." Also see *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 62 (2d Cir 1980).

The logic underlying the privilege is that an opinion can never be objectively proved true or false; and a privilege is given to the opinion provided the facts supporting the opinions are set forth. *Buckley v. Littell*, 539 F.2d 882, 893 (2nd Cir 1976), *Anton*, supra at p. 499. Where the facts underlying the opinion are set forth in the article, the opinion is afforded a privilege because each reader may draw his own conclusion to support or challenge the opinion. Id. Also see *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d at 1306 (1976).

There is an extensive discussion considering the fact/opinion distinctions in *Henry v. Halliburton*, supra at page 787-789, where it was held that it was essential to examine the totality of the circumstances to determine whether an ordinary reader would have treated a statement as an opinion. Id, p. 788.

2. One of the exceptions to the privilege is where a defamatory statement implies the allegation of undisclosed defamatory facts as the basis for the opinion. Restatement Second Torts, Sec. 566;

Cuba's United Ready Mix v. Bock Concrete, 785 S.W.2d 649, 651 (Mo. App. 1990); *Iverson v. Crow*, 639 S.W.2d 118, 119 (Mo. App. 1982); *Henry v. Halliburton*, supra; *Anton*, supra. Where a statement indicates that the speaker knew facts establishing the defamatory statement, it is actionable defamation. Id.; *Cianci*, supra, 639 F.2d at 63. Where the statement of opinion implies undisclosed facts on which the opinion is based, then the listener can not evaluate the defamatory language since no basis for the statement has been disclosed. 53 C.J.S. Libel and Slander, Sec. 12, p 46.

The Restatement provides an illustration of a mixed fact/opinion statement as follows:

> 3. A writes to B about his neighbor C: "I think he must be an alcoholic." A jury might find that this was not just an expression of opinion, but that it implied that A knew undisclosed facts that would justify this opinion. Id., Sec. 556 at 174.

A's opinion above is not privileged because "the comment creates the reasonable inference that the opinion is justified by the existence of unexpressed defamatory facts". Id, 175. "This type opinion, while an opinion in form or context, is apparently based on facts . . . that have not been stated . . . [and] gives rise to the inference that there are undisclosed facts that justify the forming of the opinion expressed by the defendant." Id. at 172. Such an opinion is not privileged. *Falls v. Sporting News Pub. Co.*, 834 F.2d 611, 615-616 (6th Cir. 1987).

Respondent's statements here do not provide the facts from which the television viewers could draw their own conclusions to support or challenge his opinions. The thousands of viewers could not understand from the facts asserted 1) how Judge Karohl failed to follow the "Supreme Court of the land", 2) how there was a distortion of the statute, 3) what purpose the judge had to arrive at a decision that he personally liked, 4) why the

judge made up his mind before he heard the case, and 5) what dishonest reasons the judge had to do such things. Thus no privilege attaches under the authorities discussed.

3. In discussion of the defamatory nature of Respondent's statements, supra, it was pointed out that false imputation of criminal conduct is defamatory. However, the Missouri Supreme Court has further held that language which suggests specific criminal conduct would constitute a statement of fact rather than a statement of opinion. *Henry v. Halliburton*, supra, 690 S.W.2d at 790. 53 C.J.S. Libel and Slander, Sec. 12, p. 47.

There is a critical distinction between opinions which attribute improper motives to a public officer, and accusations, in whatever form, that an individual has committed a crime or is personally dishonest. *Gregory v. McDonnell Douglas Corp.*, 552 P. 2d 425 (1976). There is no First Amendment protection enfolding false charges of criminal behavior. Id.

The Court in *Cianci* also declared that the *Gertz — Letter Carriers* rules protecting "pure opinions" do not cover charges which could reasonably be understood as imputing specific criminal or other wrongful acts." 639 F.2d at 64; and that the clear implication of the United States Supreme Court in *Greenbelt Pub. Co-Op Pub. Assn. v. Bressler*, 398 U.S. 6 (1970) was "that if an accusation of actual criminal wrongdoing had been conveyed . . . it would have been held actionable . . ." Id. at 62.

Thus, when a speaker said that he *considered* William F. Buckley to be a libeler like Westbrook Pegler, the court held that the "opinion" was something more than a general derogatory remark, but was laden with factual content, charging the commission of a serious crime; and the First Amendment did not confer a privilege to such an opinion. *Buckley v. Littell*, supra. The statement of an opinion charging a judge with corruption was held not constitutionally protected in *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299 (NY 1977).

"To say of a person that he is a thief without explaining why, may depending upon the circumstances, be found to imply the assertion that he has committed acts that come within the common connotation of thievery." Restatement, supra, Sec. 566, Comment b. Likewise to say of a judge that he has done improper, unethical acts for dishonest reasons without explaining why implies that he has committed criminal misconduct.

In the instant case Respondent's television interview clearly stated or implied wrongdoing by Judge Karohl. Without disclosure of the underlying facts, the viewers were not able to evaluate the defamatory language. Either lay or lawyer viewers could conclude from the statements that the judge had acted unethically, improperly, or even criminally. The charges were made "of specific defined conduct . . . not couched in terms of opinion based upon described fact premises", and "far removed from mere expressions of non-actionable opinion." *Smith v. UAW-CIO Federal Credit Union*, 728 S.W.2d 679, 685 (Mo. App. 1987).

4. It has also been held that opinions "relating to one's professional integrity that are susceptible of proof" are expressions of fact. *Held v. Pokorny*, 583 F. Supp. 1038, 1049 (S.D.N.Y. 1984), *Edwards v. National Audubon Society, Inc.*, 556 F.2d at 121-22, 53 C.J.S. Libel and Slander, Sec. 12, p. 47. Since the Respondent concedes Judge Karohl's personal integrity, the defamatory statements referring to Judge Karohl's professional integrity are susceptible of proof in this case, and also constitute expressions of fact, which are not protected.

5. Professor Prosser states that, "it can be said that the state of a person's mind is a fact and if a publisher misrepresents his state of mind, he misrepresents a fact even though it is only an opinion." Prosser and Keeton, supra, Sec. 113, p. 814. Thus where Respondent made a statement or expressed opinions which were defamatory, but which he did not believe, he would

have misrepresented the fact relating to what his opinion was. Thus there would be no privilege.

E. SUPPLEMENT TO "PROTECTED OPINION"

Since the foregoing Section E was dictated, the United States Supreme Court has decided the case *of Milkovich v. Lorain Journal* Co., No. 89-645, — U.S. — (June 21, 1990).

Milkovich holds that the dictum in the *Gertz* case supra, 418 U.S. 323, 339-340, as to "opinion" was not "... intended to create a wholesale defamation exemption for anything that might be labeled "opinion".

In *Milkovich*, Chief Justice Rehnquist states:

> "If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.' "

Milkovich also addressed the issue of opinions "susceptible to proof", and held that statements which are "sufficiently factual to be susceptible of being proved true or false", may be the basis of defamation.

Thus *Milkovich* confirms the previous analysis made under Section E.

F. FINDINGS OF FACT AS TO DISCIPLINARY RULE 8.2.

Upon the evidence in this case the Master makes the following findings of fact:

1. That Respondent knew and believed that Judge Kent E. Karohl was a man of personal and professional integrity.

2. That Respondent's statement exposed Judge Karohl to hatred, ridicule, or contempt, and reflected unfavorably upon his personal morality and integrity.

3. That Respondent's statement falsely imputed fraud, want of integrity, and misconduct in Judge Karohl professional work.

4. That Respondent's statement falsely imputed criminal conduct.

5. That Respondent's statement disparaged Judge Karohl.

6. That Respondent's statement disparaged the Court of Appeals in the administration of justice.

7. That Respondent's statement related to Judge Karohl and his motivation, rather than to the reasoning of the opinion or an analysis of the opinion.

8. That Respondent intended to state that Judge Karohl had made up his mind before he got the case.

9. That Respondent made no investigation into Judge Karohl's views or previous opinions concerning "armed criminal action" case prior to making his public statement.

10. That Respondent made the statement with malice, i.e., knowing its falsity or with reckless disregard of its truth or falsity.

11. That Respondent's personal attack on Judge Karohl was based primarily upon his disagreement with and frustration from opinions of other Missouri Appellate Judges prior to 1983.

12. That Respondent could have charged and tried Defendant Bulloch with armed criminal action along with the murder charge in the underlying case.

13. That Respondent's failure to initially charge Defendant Bulloch with armed criminal action resulted from Respondent's own mistake or inadvertence.

G. CONCLUSIONS OF LAW AS TO DISCIPLINARY RULE 8.2

Upon the evidence in this case and the foregoing discussion, the Master makes the following conclusions of law:

1. That Respondent's televised statement was defamatory as to the Court of Appeals and Judge Karohl.

2. That Respondent's statement violated Disciplinary Rule 8.2.

3. That Respondent's statement did not constitute a "privileged opinion".

4. That Disciplinary Rule 8.2, as applied to Respondent's known false charges about Judge Karohl, is not unconstitutional as a violation of the "free speech clause" of the First Amendment.

5. That the Advisory Committee has sustained its burden of proof by clear and convincing evidence.

V ANALYSIS OF DISCIPLINARY RULE 8.4

This rule provides that it is "professional misconduct" for a lawyer to (a) violate the rules of professional misconduct and (d) "engage in conduct that is prejudicial to the administration of justice". The specific misconduct charged is the making of a false statement about Judge Karohl as previously described.

Rule 8.4(a) refers to all violations of the Disciplinary Rules, including 8.2, 8.4(d) and 3.6 relating to a lawyer's extra-judicial statements about pending cases.

A violation of Rule 8.2, by false criticism of a judge, may also violate Rule 8.4(d) insofar as a defamatory statement would prejudice the fairness and procedural safeguards of the judicial process by an attempt to influence, intimidate or coerce the actions of jurors or judges, or affect the public confidence in the courts. Thus Section 8.4(d) relates to "conduct" even by way of speech.

The development of the law in this area has not been under the law of "defamation", but rather under the law relating to Contempt of Court and Lawyer Disciplinary Proceedings.

Professor Tribe has pointed out two distinctive approaches by the United States Supreme Court to "free speech" claims. When a government regulation is aimed at the communicative impact of an act, a regulation is unconstitutional unless it is shown that the message poses a "clear and present danger" or is a defamation. However when the government regulation is aimed at the non-communicative impact of an act, the "regulation is constitutional, even as applied to expressive conduct, so long as it does not unduly constrict the flow of information and ideas." Tribe, supra, Sec. 12-2, p. 791-792.

In simple terms, shouting "fire" in the crowded theater is conduct rather than speech. There is no "communication" and no "content" in such a false expression. Rather, the shout is conduct meant to cause panic or alarm. Similarly making a known false accusation against a judge in a pending proceeding is not "speech" discussing a public issue, but rather it is "conduct" in the nature of an attack or assault. There is no "communication" and no "content" in such a false expression. The regulation of false statements is thus content neutral. *Chaplinsky*, supra. Such conduct might be for the purpose of coercing, influencing, or

intimidating a judge so as to affect the result in a pending case. Such conduct may constitute "contemptuous conduct" punishable as contempt of court, or "unethical conduct" punishable as professional misconduct.

The Supreme Court has held "that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968). Ggovernment [sic] regulation of such speech/conduct is sufficiently justified if it furthers an important governmental interest, unrelated to the suppression of free expression, and if the incidental restriction on speech is no greater than essential to the furtherance of that interest. Id.

Speech, whether oral or symbolized by conduct, is also subject to reasonable time, place, and manner restrictions. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Such restrictions are valid provided they are justified without reference to the content of the regulated speech, ordinarily tailored to serve a significant governmental interest, and leave open ample alternative channels for communication. Id.

Examination of these issues of "conduct" may be made by reviewing 1.) responsibilities of lawyers and prosecuting attorneys, 2.) restrictions on lawyer speech, and 3.) analysis of the conduct in this case.

B. RESPONSIBILITIES OF A LAWYER AND PROSECUTING ATTORNEY

1. Courts cannot function without lawyers. "The office of attorney is indispensable to the administration of justice and is intimate and peculiar in its relation to, and vital to the well-being of, the court." 7 C.J.S. Attorney and Client, Sec. 4, p. 802. Lawyers act "as assistants to the court in search of a just solution to disputes." *Cohen v. Hurley*, 366 U.S. 117, 124 (1961).

Upon being admitted to the Missouri Bar every lawyer must take an oath as required by Supreme Court Rule Rule 8.11. The oath taken by Respondent Westfall was in part that he would support the Constitution, faithfully demean himself in his practice, maintiain [sic] the respect due to courts ofjustice [sic] and judicial officers, abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which he is charged.

2. The legal profession is largely self-governing;: and "this relative autonomy carries with it special responsibilities of self-government." Preamble, Rules of Professional Conduct. Thus, "every lawyer is responsible for observance of the Rules of Professional Conduct" Id. Lawyers are required to know and comply with the law and court rules designed for the protection of the public by aiding in the administration of justice and upholding the authority and dignity of the courts. 7 C.J.S. Attorney and Client, Sec. 46, p. 904.

Thus a lawyer has a duty to see that actions and proceedings in which he is engaged "are conducted in a dignified and orderly manner, free from passion and personal animosities, and that all causes brought to an issue are tried and decided on their merits only" 7 C.J.S. Attorney and Client, Sec. 4, p. 802. An attorney is required to conduct himself "with integrity, honesty and fairness, and to preserve the respect and confidence of the public, the courts and the legal profession." Id, Sec. 45, p. 901.

The Supreme Court has explained this requirement in the case of *In Re Snyder*, 472 U.S. 634, 647 (1985) as follows:

> "All persons involved in the judicial process — judges, litigants, witnesses, and court officers — owe a duty of courtesy to all other participants. The necessity for civility in the inherent contentious setting of the adversary process suggests that member of the bar cast criticisms of the system in a professional and civil tone."

If a lawyer fails to conform to a high standard of ethics, he may "bring disrepute upon the legal profession, impair the standard of the courts, and impede the administration of justice." *Leimer v. Hulse*, 178 S.W.2d 335, 339 (Mo 1982).

The legal profession has developed its own rules of ethics, and it is a function of the Bar Association to maintain high standards of professional conduct by its members. Lawyers from across the state have served on various committees of the Missouri Bar Association to review the Rules of Ethics and make recommendations to the Missouri Supreme Court in that respect. Respondent Westfall was in fact a member of the committee which recommended the adoption of Disciplinary Rule 8.2, which was adopted in 1985.

Since 1804 the Supreme Court, in the territory and State of Missouri has had the power and authority to discipline Missouri lawyers for their misconduct. Divine, *Lawyer Discipline in Missouri*, 46 Missouri Law Review, 709, 712. The United States Supreme Court has noted that: "Courts have long recognized an inherent authority to suspend or disbar lawyers . . . this inherent power derives from the lawyer's role as an officer of the court which granted admission." *In Re Snyder*, supra, 472 U.S. at 643; C.J.S. Attorney and Client, Sec. 43, p 895; *In Re Thompson*, 574 S.W.2d 365 (MO 1978). Under Supreme Court Rule 5.18, the Supreme Court is charged with the duty of reprimanding, suspending, or disbarring lawyers who are found guilty of professional misconduct.

The purpose of supervision of the bar by the judicial system "is to qualify the bar to perform its function for the public benefit, and to maintain publicly beneficial professional standards and conduct . . ." 7 C.J.S. Attorney and Client, Sec. 43, p. 894. Thus lawyer disciplinary proceedings are not designed with a primary purpose of punishment, but as an inquiry into a lawyer's fitness to continue as a lawyer, and any discipline imposed has as its

objective the protection of the courts and the public, and the maintenance of the integrity of the profession and the court." *In Re Haggerty*, 661 S.W.2d 8 (MO 1987). *In re Staab*, 785 S.W.2d 551, 554 (1990). The paramount objective in disciplinary proceedings is to protect society and maintain the integrity of the legal profession. *In Re Lang*, 641 S.W.2d 77 (MO 1982); *Leimer v. Hulse*, supra; *Middlesex Ethics Com. v. Garden State Bar Assn.*, 457 U.S. 423, 434 (1982).

3. As lawyers, Prosecuting Attorneys must meet all of the requirements of the Rules of Professional Conduct. However, they, and all "lawyers holding public office assume legal responsibilities going beyond those of other citizens." Comment, Disciplinary Rule 8.4. The "Special Responsibilities of a Prosecutor" are described in Disciplinary Rule 3.8. The Comment to that rule states that "a Prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Prosecutors have been described as "judicial or quasi-judicial officers". 27 C.J.S., District and Prosecuting Attorneys, Sec. 1, p. 622.

A prosecutor's obligation is not simply to obtain a conviction, but to see that justice is done and that the accused gets a fair trial. *State v. Hicks*, 535 S.W.2d 308, 311 (Mo App 1976); *State v. Jackson*, 664 S.W.2d 583, 584 (Mo App. 1984); Volume 1, ABA Standards for Criminal Justice, 2nd Ed, *The Prosecution Function*, Sec. 3-1.1.(c), 1978). It is the duty of the Prosecutor to be impartial and to refrain from conduct that causes him to be a heated partisan who appeals to prejudice and seeks conviction at all costs. *State v. Wintjen*, 500 S.W.2d 39, 43-44 (Mo App 1973).

C. LIMITATIONS ON LAWYER "FREE SPEECH"

1.) The Supreme Court has consistently used the "clear and present danger" standard in reviewing out-of-court statements critical of the administration of justice in ongoing judicial proceedings; and has assumed that all behavior and speech that prevents the fair adjudication of a case presents a "clear and

present danger", and is punishable as contempt. Tribe, supra, Sec. 12-11, p. 856-857. The state's interest advanced to justify this limitation is the interest in fair trials, in putting guilty criminals in jail, and in maintaining confidence in the fairness of the judicial system. Id., n. 3, p. 857. However, such statements must pose a "serious and imminent threat" of interference with the fair administration of justice. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1974), *In Re Oliver*, 452 F.2d 111 (7th Cir 1971).

The United States Supreme Court has recognized " that the states have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interest they have broad power to establish standards for licensing practitioners and regulating the practice of professions... The interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the court". *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). *In Re Primus*, 436 U.S. 412, *Ohralick v. Ohio State Bar Assn.*, 436 U.S. 447, 460 (1978).

"The most fundamental of all freedoms" is the right to a fair trial. *Estes v. Texas*, 381 U.S. 532, 540 (1965) and courts have the duty to ensure fair trials to all citizens. *Sheppard v. Maxwell*, 384 U.S. 333 (1966); and to control prosecutors and defense lawyers from the divulgence of inflammatory publicity. Id., p. 361; but also see *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976), *Chicago Counsel of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir., 1975). It is recognized that "[e]xtra-judicial statements to the media provide a powerful prosecutorial weapon to prejudice a defendant's right to a fair trial." Gershman, *Prosecutorial Misconduct*, Sec. 6.2 (Clark Boardman Co. 1989).

As expressed by Justice Holmes, "[t]he theory of our system is that the conclusions to be reached in the case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). "Legal trials are not like elections, to be won through the use of the meeting hall, the radio, and the newspaper." *Bridges v. California*, 314 U.S. 252 (1941). The Supreme Court has insisted that no one be punished for a crime without "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." *Chamber v. Florida*, 309 U.S. 227, 236-237 (1940).

When there is an irreconcilable conflict, the right of free speech must give way to the right of a fair trial. *Chicago Council of Lawyers v. Bauer*, supra at p. 248. When the judicial function is integrally threatened by contemptuous expressions, the "administration of the judicial enterprise necessitates subjugation of other rights, including the rights of persons to freely and even intemperately express their minds." *McMilian v. Rennau*, 619 S.W.2d 848, 852 (Mo. App. 1981).

Thus public comment of every character upon pending trials or legal proceedings may not be as free as similar comments after a complete disposal of the litigation. *Pennekamp v. Florida*, 328 U.S. 331, 346 (1946). As Justice Holmes has stated: "When a case is finished, courts are subject to the same criticism as other people. The propriety and necessity of preventing interference with the course of justice by premature statements, argument, or intimidation hardly can be denied." *Patterson v. Colorado*, supra.

Thus there is a "delicate balance between a lawyer's right to speak, the right of the public and the press to access to information, and the need of the bench and bar to ensure that the administration of justice is not prejudiced by a lawyer's remark."

Ramsey v. Board of Professional Responsibility, 771 S.W.2d 116, 121-22 (TN 1989). Courts must ensure that lawyer discipline "does not create a chilling effect on First Amendment rights."

2.) A lawyer is a person and he too has a constitutional freedom of speech, *In Re Sawyer*, 360 U.S. 666 (1959), even as a participant in the administration of justice. *In Re Hinds*, 449 A.2d 483, 489 (NJ 1982).

However, "where a lawyers unbridled speech amounts to misconduct which threatens a significant state interest, a state may restrict the lawyer's exercise of personal rights guaranteed by the Constitution." *NAACP v. Button*, 371 U.S. 415, 438 (1963). *Matter of Johnson*, 729 P.2d 1175, 1178 (KN 1986).

"Generally, courts are in agreement that while a lawyer may, in a proper tone and through appropriate channels, attack the integrity or competence of a court or judge, or the propriety of any particular judicial act, he may not, by *unfounded charges* create disrespect for courts or their decisions, and if he does so, he maybe properly disciplined. Attorneys have wide latitude in differing with, and criticizing the opinions of the court, yet when they resort to *misrepresentation and unwarranted assaults on the courts* whose officers they are, they violate their duty and obligation and are subject to discipline. 7 C.J.S. Attorney and Client, Sec. 23, p. 752 (Emphasis added).

"[A] lawyer's right of free speech does not include the right to violate the statutes and canons proscribing unethical conduct." *Committee on Prof. Ethics and Conduct v. Hurd*, 360 N.W.2d 96, 105 (IA 1984). Generally, a layman may pursue his free speech until he runs afoul of the defamation laws, but a lawyer will be stopped when he infringes the Canons of Ethics. *In Re Woodward*, 300 S.W.2d 385 (Mo 1957).

A lawyer cannot "invoke the constitutional right of free speech to immunize himself from evenhanded discipline for proven unethical conduct", and he must conform to professional "standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice." *In Re Sawyer*, supra at page 646-47, Steward J. concurring, and speaking for five members of the court) "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech". Id.

Thus "attorneys who go beyond the latitude afforded them in differing with, and criticizing the opinions of, the courts and resort to *misrepresentation and unwarranted assaults on the courts*, are subject to suspension or disbarment." 7 C.J.S. Attorney and Client, Sec. 82 b, p. 995 (emphasis added). A lawyer "has no right . . . to asperse and defame, without justification, the character and motives of the judge upon the bench." *Leimer v. Hulse*, 178 S.W.2d at 340. There are some special limitations on a lawyer's speech since his membership in the bar is a privilege burdened with conditions; he is an officer of the court, and "like the court itself an instrument or agency to advance the ends of justice." *People Ex Rel Karlin v. Culkin*, 162 N.E. 487, 489 (1928).

3. The above principles may be somewhat illustrated by listing specific circumstances where lawyer's speech is constitutionally restricted.

Many disciplinary rules are well accepted, although they restrict a lawyer's free speech. For example, free speech does not allow a lawyer to reveal confidential information received from his client. Disciplinary Rule 1.6. Likewise, free speech does not allow a lawyer to represent clients with conflicting interest. Disciplinary Rule 1.7, 1.8, and 1.9. Free speech does not allow a lawyer to make a false statement of material fact or law to a

court, Rule 3.3(a)(1); or offer evidence that the lawyer knows to be false. Rule 3.3(a)(4). Prosecutors are not allowed to exercise their free speech to disclose the fact or any indictment being found by a grand jury until the arrest or recognizance of the defendant. Section 545.090 RSMo. Free speech does not allow a lawyer to communicate with an opposing party who is represented by another lawyer. Rule 4.2. Free speech does not allow a lawyer to make false or misleading communications about his services. Rule 7.1. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Free speech does not allow a lawyer to testify in a case where he is an advocate, except in limited circumstances. Rule 3.7; 7 C.J.S. Attorney and Client, Sec. 87, p. 1006. Free speech does not allow a lawyer to have ex parte communication to a judge about a pending case. *Re Chopak*, 60 F.Supp. 265 (D.C., NY (1946, aff. 160 F2d 886, cert. denied 331 U.S. 835).

Rules restricting lawyers from solicitation of clients do not violate the lawyer's freedom of speech. *Oralick v. Ohio State Bar Assn.*, 436 U.S. 447 (1978), *In Re Jones*, 431 S.W.2d 809 (MO 1966), *In Re Woodward*, supra, 7 C.J.S., Attorney and Client, Sec. 47, p. 908. Likewise, a lawyer's free speech is not violated by court rules prohibiting lawyer advertising under certain circumstances. *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626 (1985). Obscene epithets directed towards a judge in a court proceeding could be found a contempt of court. *Eaton v. City of Tulsa*, 415 U.S. 697, 698 (1974).

D. APPLICATION TO THE INSTANT CASE.

1. EXTRA-JUDICIAL STATEMENTS

The Bar Committee asserts that Respondent's attack upon Judge Karohl's integrity was the culmination of a series of unethical acts in the prosecution of the *Bulloch* case, including 1) Respondent's public statements criticizing the jury, 2) Respondent's public comments about Defendant Bulloch's character, credibility, reputation and record, and 3) Respondent's

public expression of opinion as to Bulloch's guilt of murder, both before the trial, and after Bulloch was acquitted of murder and found guilty only of involuntary manslaughter.

Under the Disciplinary Rules, a prosecutor may not make extra-judicial statements to be publicly disseminated if he knows or reasonably should know that it will have a substantial likelihood of materially prejudicing adjudicative proceeding". Rule 3.6(a), Rule 3.8(e). The rules further provide that such a statement "ordinarily is likely to have such an effect when it refers to . . . a criminal matter", and the statement relates to "the character, credibility, reputation or criminal record of a party", Rule 3.6(b)(1); or to "any opinion as to the guilt or innocence of a defendant or suspect." Rule 3.6.(b)(4). Also see 7 C.J.S., Attorney and Client, Sec. 53 b, p. 925; Volume 2 ABA Standards for Criminal Justice, Fair Trial and Free Press, Second Ed., Sec. 8-1.1, (1978), (which is essentially equivalent to Disciplinary Rule 3.6.); Prosecutorial Misconduct, supra, Sec. 6.2(f).

The tendency of a minority of prosecutors and defense council to indulge in "trial by press" is a disservice to the fair administration of justice. ABA Standards, The Defense Function, Sec. 4-1.4.16. The expression of a Prosecutor's personal opinion as to the guilt of a defendant "is condemned because it unfairly exploits the tremendous power and prestige of the prosecutor's office." Prosecutorial Misconduct, supra, Sec. 10.5.

The ABA Standards further provide that "a prosecutor should not make public comments critical of a verdict, whether rendered by a judge or jury" since such remarks may improperly influence the jurors in other cases to which they may be assigned. ABA Standards, supra, 3-5.10., and commentary thereon.

2. RESPONDENT'S CRITICISM OF THE BULLOCH JURY.

Respondent Westfall was not present during the initial trial of Dennis Bulloch for the murder of his wife. However, when the jury acquitted Bulloch of murder and found him guilty only of involuntary manslaughter, Respondent sought out reporters of the St. Louis Post Dispatch and held what amounted to a press conference (MBA Ex. 4, Article quoting the same). In that conference Respondent criticized the jury and questioned its integrity, asserting among other things "they didn't compromise: they caved in. That is a heartbreaker — for this office, for Julia's family, and for the community." The statement clearly implied that Bulloch was guilty of murder despite the jury's verdict.

At this conference Respondent also reported a "public outrage" at the jury's verdict. However, defense counsel later argued that any "public outrage" had been generated "between the media and Mr. Westfall . . . [who] threw so much fuel on this fire . . .". (Ex. 6, p. 37-47); and that the actions taken by Mr. Westfall were based upon false assumptions of such outrage (Ex. 6, p. 38, 40).

That some jurors in the Bulloch case were affected by Respondent's statements is suggested by their subsequent responses to his criticism, the extensive publicity, and direct contact by the media. Although the jury verdict had been unanimous and the jurors had been polled, and individually affirmed the verdict in open court, it was later reported that some of the jurors equivocated and even expressed disagreement or regret with the verdict following the public criticism. (MBA Ex. 4, MBA Ex.6).

Another danger to the administration of justice undoubtedly arose the next day or week when these jurors returned to serve in other criminal cases. At that time each of them had to contem-

plate that if he or she failed to vote for a guilty verdict, he might again be subject to a critical attack by the prosecutor in the newspapers and/or other media. The average juror would undoubtedly like to avoid such an attack, and would probably have considerable doubt as to his own abilities to make an appropriate response or command media attention.

It may also be observed that many of the 33 Circuit and Associate Circuit Judges in St. Louis County are regularly conducting criminal jury trials involving in the total, hundreds of jurors. Undoubtedly, most of these jurors would not be influenced by Respondent's remarks, but others of less fortitude might be reluctant not to convict criminal defendants if they also felt personally threatened by Respondent's public attack upon other sitting jurors.

It must also be considered that at this time the manslaughter conviction was still pending in the trial court since various motions could be filed and presented to the trial judge prior to any appeal of the case. Respondent's improper attack upon the jury was thus an attack on the court process and presented the appearance of an attempt to influence or intimidate the trial judge as well. Prosecutors should "avoid the fact or appearance of trying to intimidate a judge". ABA Standards, supra, Sec. 3-5.10 and Commentary. "Even after the verdict the prosecutor remains under a duty not to make statements that could affect the defendant's sentencing." Prosecutorial Misconduct, supra, Sec. 6.2(j).

At the time of Respondent's remarks about the Bulloch case and its jury, Bulloch was awaiting trial on the arson trial. Obviously, members of the public exposed to his remarks would serve upon that jury. "When a defendant is awaiting trial, comments by the prosecutor on the heinousness of the crime can reflect adversely on the defendant's character, and therefore are prohibited." Prosecutorial Misconduct, supra, Sec. 6.2(c).

Lastly it must be recognized that the grand jury, which had originally indicted Defendant Bulloch, was still sitting when Respondent criticized the trial jury on June 3rd. Thus Respondent's remarks relating to Bulloch's character, credibility and reputation, and his expression of opinion as to Bulloch's guilt, were also improperly directed to the grand jury. Respondent's reference to Bulloch's guilt of the murder or manslaughter charge was also a direct reference to Bulloch's guilt of the armed criminal action charge (the same offense) which was immediately submitted to the grand jury. The grand jury then indicted Bulloch on "armed criminal action" within two weeks of Respondent's statement.

The United States Supreme Court has held that grand juries have equally important functions of first serving as a prosecutorial and investigative arm of the state, and second to safeguard citizens against an overreaching prosecutor and unfounded accusations. *Butterworth v. Smith*, 494 U.S. ___, 108 L.Ed. 2d 572, 580 (1990). It is certainly preferable that grand jury indictments should result from matters presented to them during their deliberations, and not from matters presented to them by the media. The restrictions on extra-judicial statements by both prosecutors and defense lawyers apply from the beginning of the criminal investigation, and during the time of presentation to a grand jury. Commentary ABA Standards, supra, Sec. 8-1.1 (1978).

Prosecutor's "have the ability to influence and insure proper government procedure without resort to public opinion .... The judicial system... has the right to expect that its own officers will not make public that which should not reach a juror . . . The possible prejudicial effect of negative comment [on "character, reputation, or prior criminal record" of a defendant] is self evident . . . The prohibition on opinion as to guilt or innocence is permissible since this is a traditional ethical requirement in the legal profession and such an opinion could never properly be offered in court." *Chicago Council of Lawyer's v. Bauer*, supra,

522 F.2d 242, 253-255. Also see, *In Re Rachmiel*, 449 A.2d 505, 510 (NJ 1982).

3. RESPONDENT'S PRESS RELEASE ABOUT NEW CHARGES.

Prosecutors are also prohibited from exploiting their office by means of personal publicity connected with a case before trial, during trial or thereafter. Volume 1, ABA Standards, The Prosecution Function, supra, Sec. 3-1.3(a). The Commentary to this section states that a prosecutor should not exploit the power and prestige of his office for purposes of personal aggrandizement and further states: "Circumspection in this respect is more acutely required in cases that excite public interest." "Prosecutors have been condemned . . . for utilizing the vehicle of the 'press conference' to celebrate with considerable fanfare a defendant's indictment." Prosecutorial Misconduct, supra, Sec. 6.2 "Television's impact before trial can be monumental." Id., Sec. 6.2(k).

On June 18, 1986, fifteen days after the jury verdict, Respondent issued a press release (MBA Ex. 5). This release announced that Dennis Bulloch had been charged with the felonies of armed criminal action and destroying physical evidence. The press release indicated Respondent's continuing belief of Bulloch's guilt of premeditated murder, and reiterated that the jury had "made a tragic mistake". Respondent announced his goal to keep Mr. Bulloch in prison "for a long long time", and a second goal to prevent Bulloch from receiving any interest in his deceased wife's estate. The release announced the institution of "civil forfeiture proceedings" in this respect, that the bond was one-half millions dollars, and that Respondent would oppose any release prior to trial. It again referred to the "public outrage" concerning the jury's verdict. On June 19, 1987, the St. Louis Post Dispatch published an article (MBA Ex. 6) substantially based upon this press release.

Respondent's press release was a further attack upon the members of the initial Bulloch jury, and was intimidating to them in their continuing service as jurors as well as to all other sitting jurors in the discharge of their official duties. The statement also improperly commented upon the character, and guilt or innocence of Mr. Bulloch on the new charge of armed criminal action, which was still to be heard by another jury. Respondent's statements could improperly prejudice potential jurors for that trial. Although a change of venue of the trial of the case could partially avoid this consequence, to some degree that infringes on a defendant's right to trial in the county where he lives when he is compelled to take a change of venue by improperly generated publicity. There is also the danger that jurors in another jurisdiction could also be infected by the reach of the metropolitan St. Louis media.

4. RESPONDENT'S CRITICISM OF JUDGE KAROHL.

As noted, speech is subject to reasonable time, place, and manner restrictions. *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 293 (1984).

The "time" factor is present in this case. In the context of "conduct" under Rule 8.4, it must also be recognized that the Bulloch case was still pending at the time of Respondent's statement about Judge Karohl. The arson and tampering charges were still pending in the trial court, and the armed criminal action case was still pending before the Court of Appeals. Judge Karohl and his colleagues would still be required to rule on various motions to be filed by the state, including motions for rehearing, to transfer to the Appeals Court En Banc, or to transfer to the Supreme Court. Whatever action Judge Karohl took on such motions could be perceived by the public to be a response to Respondent's intimidating statements. There was evidence in this case of a public perception of such influence by testimony that a lawyer inquired of Judge Karohl if Respondent's statement

was "going to coerce your views on legal matters in the future?" (MBA Ex. 1, p. 29)

Although "judges are supposed to be men of fortitude, able to thrive in a hardy climate", *Craig v. Harney*, 331 U.S. 367, 376 (1947), comment on pending cases may affect judges differently and may influence some judges more than others. *Pennekamp v. Florida*, supra, 328 U.S. at 348. Judges are human and there is a danger that some judges might be consciously or unconsciously influenced by improper extra-judicial comment prior to the conclusion of a case. Thus "[a] state may protect against the possibility of a conclusion by the public under [such] circumstances that the judges action was in part a product of intimidation, and did not flow only from the fair and orderly working of the judicial process. *Chicago Council of Lawyers v. Bauer*, supra at p. 256. There is no distinction between bench trials and jury trials. Id., p. 257. Extra-judicial statements should be judged with a view to their likely effect on the public's belief in the integrity of a court as an institution. *Matter of Frerichs*, 238 N.W.2d 764, 767 (IA 1976).

It is recognized that comments made by attorneys about ongoing trials can carry significant weight in the minds of members of the public including potential jurors, witnesses and others who may have a role to play in the trial. *In Re Hinds*, 449 A.2d 483, 496 (NJ 1982); and that extra-judicial statements by prosecutors and defense council should not be permitted to frustrate the function of the court. Id. at p. 491. A lawyer's false accusations against a judge can be an assault directed at the judicial system and challenging the integrity of the court system and its officers. *Matter of Terry*, 394 N.E.2d 94, 96 (IN 1979). A lawyer's harassing or intimidating statements about a pending case may amount to professional misconduct. *State v. Nelson*, 504 P.2d 211, 215 (KS 1972). *Eisenberg v. Boardman*, 302 F Sup 1360, 1365 (1969)

As Justice Frankfurter has observed: "The decisive consideration is whether the judge or the jury is, or presently will be, pondering a decision that comment seeks to affect. Forbidden comment is such as will or may throw psychological weight on the scales which the court is immediately balancing." *Pennekamp*, at page 369.

A permissible restriction on "place" also applies here where Respondent's false statement about Judge Karohl was made on public television to be heard in the homes of thousands of viewers, rather than in the office of the Commission on Judicial Discipline.

The compelling interest of the State in the public perception of the integrity of the judicial process was obviously far more seriously harmed by this massive report. The false statement was given undue credence because 1.) "many people tend to automatically accept [television news] as conveying truth", Restatement, supra, Section 568 A, Comment a; 2.) because of Respondent's position and authority; and 3.) because Judge Karohl was unable to make any response under Ethical Rules concerning a judge's comment on pending cases.

Permissible "manner" factors are also involved here. If Respondent had held the belief that Judge Karohl had acted improperly, he was obligated by Disciplinary Rule 8.3(b) to inform the Commission on Retirement, Removal and Discipline which deals with judicial misconduct under Supreme Court Rule 12. See *In Re Jafree*, 444 N.E.2d 143, 149 (IL 1982).

The Supreme Court of Arizona has held that "any grievance a lawyer may have concerning ethical misconduct by a sitting judge should be submitted to the Commission on Judicial Qualifications. 'Going public' by a member of the bar is not the appropriate method to redress misconduct by a judge". *Matter of Riley*, 691 P.2d 695, 705 (AZ 1984). Accord: *Heleringer*, supra at p. 168; *State Ex Rel Neb. v. Michaelis*, 316 N.W.2d 46,

54 (Neb. 1982). Making public remarks about alleged improper conduct rather than taking constructive remedial action was held to belie the assertion that the statements were made in "good faith". *Matter of Lacey*, 283 N.W.2d 250, 252 (S.D. 1979).

4. Another issue may be noted. Disciplinary Rule 3.8 provides that a prosecutor shall "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." It is absolutely clear that the issues raised by the "armed criminal action" charge, filed after Bulloch's conviction for manslaughter, had been resolved by that conviction. As a matter of law the subsequent charge of "armed criminal action" was not "supported by probable cause". This aspect of the case is not discussed here in order to determine whether Respondent violated this Disciplinary Rule. This has not been presented. However it is evidentiary of Respondent's state of mind and pattern of conduct.

5. With some reluctance, but with a feeling of necessity and propriety, your Master also judicially notices newspaper reports of certain statements attributed to Respondent following the hearing before the Master on February 23rd, 1990.

The St. Louis Sun of February 24th, 1990, quoted Respondent as stating after the hearing that the effort to disbar him was "absurd, offensive, and outrageous" (Master's Ex. "A").

The St. Louis Post-Dispatch of February 24th, 1990, quoted Respondent as stating: "This is an effort to muzzle me and I'm going to fight it. I want the public to be my judge and jury." (Master's Ex. "B").

The St. Louis Sun of February 25th, 1990, quoted Respondent as stating that "Prosecutors shouldn't be muzzled by a commission". (Master's Ex. "C").

The St. Louis Sun of February 25th had a second article reporting speculation that the timing of the hearing on Respon-

dent was purely political since it was ten days before he was to make a political announcement. In this respect Your Master reports that a previous hearing date on January 29th, 1990, had been cancelled because the attorneys for the Advisory Committee and for Respondent had agreed to submission of the case upon stipulations and exhibits. However, it was Respondent who personally requested subsequent public hearing which was scheduled at the earliest date mutually convenient for the lawyers and the Master. It is also noteworthy that this article from the Sun quotes Respondent's attorney about the scheduling of the hearing as stating: "There was nothing political about it". (Master's Ex. "C")

The Post-Dispatch of February 26th quoted Respondent as stating two days after the hearing that the recommendation that he be suspended from practicing law was "completely politically motivated", and that the lawyer for the Missouri Bar Advisory Committee was "arrogant", "biased", and "vindictive". (Master's Ex. "D").

The Post-Dispatch of February 27th also reported that Respondent had accused the lawyer for the Advisory Committee of "political bias", and that the recommendation was "totally insane". (Master's Ex. "E").

It cannot be assumed that the reports are true since no evidence has been had upon them. They will not be considered by the Master in determination of the issues presented in this case.

However, since the reports were made, two considerations should at least be noted:

First, although a lay person might be free to make such remarks, a lawyer might not be. The fact that Respondent is a party in this proceeding does not change his status as a "lawyer", with professional obligations in this pending case. Such statements by a lawyer could give the appearance of an improper

attempt to influence, coerce, or intimidate the outcome of the pending proceeding. To the extent that any of the reports were also found to be false, these could also unfairly undermine public confidence in the administration of justice.

Second, such remarks about an opposing attorney in the case might also be improper under the Disciplinary Rules. Chief Justice Hyde has asserted that a lawyer "has no right to attempt to cast foul and unfounded aspersions upon the character and conduct of his brother members of the bar." *Leimer v. Hulse*, supra, 178 S.W.2d at 340.

It may be plainly stated. Politics are not involved in this case. The issues presented relate only to professional misconduct. Like all other cases, this one cannot be tried in the media (though the public may make its own judgments.) The public did not hear the hours of testimony or examine the hundreds of pages of documents and testimony, which are the basis of this report.

The Master makes a separate finding at this point that Mr. Oliver, as attorney for the Advisory Committee, and Mr. Schaaf, as attorney for Respondent, have both zealously, ably, and honestly represented their clients in this proceeding.

F. FINDING OF FACT AS TO DISCIPLINARY RULE 8.4

Upon the evidence in this case, the Master makes the following findings of facts:

1. That the findings of fact under the analysis of Rule 8.2 are adopted and incorporated herein.

2. That the Respondent improperly attacked and criticized the initial Bulloch jury following its verdict.

3. That in his initial criticism of the Bulloch jury, Respondent improperly made public statements concerning Bulloch's character, credibility and reputation, and expressed opinions as to Bulloch's guilt or innocence.

4. That the criticism of the initial Bulloch jury was made at a time when the manslaughter conviction was still pending before the trial judge, and the arson charge was pending and awaiting jury trial.

5. That, in his press release announcing further charges against Bulloch, Respondent improperly made public statements concerning Bulloch's character, credibility and reputation, and expressed opinion as to Bulloch's guilt or innocence at a time when the manslaughter conviction was still before the trial judge, and the arson, armed criminal action, and tampering charges were pending and awaiting jury trial.

6. That Respondent's false public statement about Judge Karohl was a misrepresentation and an unwarranted assault upon the Court of Appeals and its officers.

7. That Respondent's public statement about Judge Karohl was made at a time when the armed criminal action matter was pending before a panel of the Court of Appeals, including Judge Karohl, and while the arson and tampering charges were pending and awaiting jury trial.

8. That Respondent's extra-judicial statements in the above findings amounted to "conduct" improperly attacking or seeking to influence the court system and it's [sic] personnel, i.e. jurors, trial judges, and appellate judges.

9. That there was no "communicative impact" or free speech "content" in Respondent's known false statements about Judge Karohl.

10. That Respondent failed to maintain the respect due from a lawyer to a court of justice and it's [sic] judicial officers.

11. That Respondent's known false statements unfairly undermined public confidence in Judge Karohl, the Court of Appeals, and in the Administration of Justice.

12. That Respondent had, but failed to use, ample, alternative channels of making any charges of alleged judicial misconduct.

13. That Respondent's various extra-judicial statements in the above findings were an exploitation of his office and a sensational case for personal publicity and self-aggrandizement.

G. CONCLUSIONS OF LAW AS TO DISCIPLINARY RULE 8.4

Upon the evidence in this case and the foregoing discussion the Master makes the following conclusions of law:

1. That the conclusions of law as to Disciplinary Rule 8.2, supra are adopted and incorporated herein.

2. That Respondent's public criticism of the initial Bulloch jury's verdict while that case and the arson charge were still pending constituted professional misconduct.

3. That Respondent's criticism of the Bulloch jury had a substantial likelihood of materially prejudicing a pending adjudicative proceeding in violation of Disciplinary Rule 3.6(a), 3.6(b)(1), and 3.6(b)(4), and ABA Standards, Section 8-1.1 and Standard 3-5.10.

4. That Respondent's press release announcing additional charges against Defendant Bulloch constituted professional misconduct in violation of Disciplinary Rule 3.6 and ABA Standards, Section 8-1.1.

5. That Respondent known false statements concerning Judge Karohl violated Disciplinary Rule 8.4(d).

6. That Respondent violated Disciplinary Rule 8.4(a) by violations of Rule 8.2, 8.4(d), and of Rule 3.6.

7. That the Disciplinary Rules, as applied to Respondent's known false statement against Judge Karohl, further an impor-

tant governmental interest, unrelated to suppression of free expression; and that these restrictions are no greater than essential in the furtherance of that interest.

8. That the Disciplinary Rules, as applied to Respondent's false charges against Judge Karohl, are not unconstitutional as a violation of the "free speech" clause of the First Amendment.

9. That the Advisory Committee has sustained its burden of proof by clear and convincing evidence.

V RECOMMENDATIONS

A. THE CHARGE

It must first be clearly stated that the *only* charge made by the Advisory Committee against Respondent relates to his false statements about Judge Karohl.

The other acts of professional misconduct which have been found here are not charged, and they will only be considered by your Master as they relate to the Committee complaint. The evidence and findings as to other misconduct do establish a "pattern of conduct" and give perspective to the charged offense. They relate to state of mind, malice, motivation, and scienter. They are also relevant as an aggravating circumstance. Repeated violations of Disciplinary Rules "dispel any idea of inadvertence, and present the question of the cumulative effect of such improprieties." *State v. Tiedt*, 206 S.W.2d 524, 538 (Banc 1947).

B. AGGRAVATING CIRCUMSTANCES

Respondent's professional misconduct was certainly destructive of the public perception of the Missouri Court of Appeals and its officers, and personally and professionally damaging to a judge whom Respondent recognizes as having unquestioned personal integrity.

Respondent's twenty years of experience as a prosecutor belies any suggestion that he may have acted inadvertently or mistakenly, but rather that he did so knowingly or recklessly of the damage that he would cause. The only apparent conclusion is that the very unusual and sensational aspects of the case afforded him an opportunity of personal publicity and self-aggrandizement which he utilized without reflection upon the serious consequences entailed.

It is a matter of grave concern that Respondent has an attitude that he should have a completely unlimited and unfettered license of public comment about all aspects of pending criminal cases, whether or not such comment violates the law as provided by the Disciplinary Rules of the Supreme Court. This is aggravated in this case where Respondent admits the falsity of the comment made.

Although a prosecutor must be zealous in the execution of his duties in the administration of justice for the protection of the public, he cannot himself violate the law, even to achieve legitimate ends; nor can he do so for the purpose of self-aggrandizement. A prosecutor is not above the law or beyond the reach of the Disciplinary Rules.

It is even more important for government officials to obey the law than for others to do so. This concept has been ably expressed by Justice Brandeis in the case of *Olmstead v. United States*, 277 U.S. 438 (1928) as follows:

> "Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Respondent has shown a lack of restraint and self discipline in his dealing with the courts and its personnel, including jurors and

a judge (and perhaps even the Advisory Committee and its attorney). He has not realized that ". . . epithets, verbal abuse, unfounded accusations and the like have no place in legal proceedings." *Matter of Ronwin*, 680 P.2d 107, 115 (Arizona 1983); or ". . . that civilized, rational behavior is essential if the judicial system is to perform its function." Id. Habitual, unreasonable reaction to adverse rulings is conduct of a type not permitted of a lawyer when acting as a lawyer, and may reveal a lack of responsibility relating to fitness to practice law. Id. The custom of vilifying those who oppose him is improper conduct for a lawyer. Id., page 118.

C. MITIGATING CIRCUMSTANCES

Respondent's attorney has reported that Respondent has been "a good public servant for twelve years and . . . a good prosecutor for over twenty years, who has served his community and served the constituents of this state very well and honorably. . . . He's a decent human being; he's honest; he's an outstanding member of the Missouri Bar, and he values his license and his right to practice law in this state most highly . . ."

It can also be noted that the state of the law as to lawyer's extra-judicial statements and criticisms of judges has been somewhat in a state of flux since the decision in the *New York Times* case in 1968. See Commentary ABA Standards, Sec. 8-1.1. To that extent there may have been some uncertainty as to application of the Disciplinary Rules. The Comment to Disciplinary Rule 3.6 recognizes also that: "It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free express."

False expressions have no constitutional value, and professional misconduct must be controlled. However, the public has an important and legitimate interest in the conduct of judicial proceedings, and lawyers do have a duty under Disciplinary Rule 8.3(b) to inform appropriate authority of a judge's violation of

Rules of Judicial Conduct. It is important that a "chilling effect" is not has upon such legitimate free speech.

Respondent has privately stated his belief in Judge Karohl's personal integrity. At the Committee hearing Respondent also privately apologized to Judge Karohl. This is a mitigating circumstance. However, he has failed to make any such public statements; and thus has failed to alleviate the damage that he has done to the Court of Appeals or to Judge Karohl. Therefore a public recognition of Respondent's belief in Judge Karohl's personal integrity, and a public apology to the Court of Appeals and to Judge Karohl would be helpful in restoring the public confidence in the administration of justice. This would have a further mitigating effect.

Lastly, it is recognized that the purpose of this proceeding is to protect the public by correction of any improper actions. Hopefully these proceedings and the recommended sanctions will accomplish that end.

D. Upon the foregoing, it is the recommendation of the Master that:

1. Respondent be suspended from the practice of law for a period of one year.

2. That the order of suspension be stayed; that Respondent be publicly reprimanded; and that Respondent be placed on probation for a period of one year with the conditions that:

a. That he obey the Disciplinary Rules.

b. That he make a public apology to the Court of Appeals and the Hon. Kent E. Karohl.

c. That costs be taxed to Respondent.

Respectfully submitted.

/s/ Bruce Normile
Special Master

APPENDIX C

No. 72022

In the Supreme Court of Missouri
May Session, 1991

In re: In the Matter of George E. (Buzz) Westfall,
Respondent.

(DISCIPLINARY PROCEEDING)

Now at this day, come the parties aforesaid, the informants by their attorney and the respondent by his attorney, and the Court having considered the report of the Master, the Honorable Bruce Normile, and thereafter, the above-entitled cause having been fully heard, briefed, argued and submitted to the Court; and the Court now being sufficiently advised of and concerning the premises, it is ordered that the respondent be, and he is hereby, reprimanded for violation of the Rules of Professional Conduct.

It is further ordered that the costs herein are taxed against the respondent.

(Opinion filed.)

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1991, and on the 3rd day of May 1991, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 3rd day of May 1991.

/s/ Thomas F. Simon
Clerk

APPENDIX D

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102
June 11, 1991

Mr. George E. Schaaf
Pierre Laclede Center, Suite 800
7733 Forsyth Boulevard
Clayton, Missouri 63105

In re: George R. (Buzz) Westfall
Supreme Court No. 72022

Dear Mr. Schaaf:

Please be advised that the Court this day entered the following order in the above-entitled cause:

"Respondent's motion for rehearing overruled."

Very truly yours,

THOMAS F. SIMON

/s/ Mary Elizabeth McHaney
Deputy Clerk, Court en Banc

cc: Mr. George R. Westfall
Mr. Harold W. Barrick
Mr. John L. Oliver, Jr.

APPENDIX E

EXAMPLES OF NEGATIVE COMMENTARY

United Steelworkers of America v. Weber, 443 U.S. 193, 218 (1979) (dissenting opinion of Burger, C.J.):

> It is often observed that hard cases make bad law. I suspect there is some truth to that adage, for the "hard" cases always tempt judges to exceed the limits of their authority, as the Court does today by totally rewriting a crucial part of Title VII to reach a "desirable" result. . . .

# # # #

Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3067, 3075 (1989) (opinion of Blackmun, J., concurring in part and dissenting in part):

> Never in my memory has a plurality announced a judgment of this Court that so foments disregard for the law and for our standing decisions.
>
> Nor in my memory has a plurality gone about its business in such a deceptive fashion. . . .
>
> . . . .
>
> The opinion contains not one word of rationale for its view of the State's interest. This "it-is-so-because-we-say-so" jurisprudence constitutes nothing other than an attempted exercise of brute force; reason, much less persuasion, has no place.

# # # #

United Steelworkers of America v. Weber, 443 U.S. 193, 222 (1979) (dissenting opinion of Rehnquist, J.):

> Thus, by a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, "uncontradicted" legislative history and uniform precedent in concluding that employers are, after all, permitted to consider race in making employment decisions. . . .

# # # #

National League of Cities v. Usery, 426 U.S. 833, 867, 872, (1976) (dissenting opinion of Brennan, J.):

> Today's repudiation of this unbroken line of precedents that firmly reject my Brethren's ill-conceived abstraction can only be regarded as a transparent cover for invalidating a congressional judgment with which they disagree. . . .
>
> . . . .
>
> Moreover, it is sophistry to say the Economic Stabilization Act "displaced no state choices," *ante*, at 2474, but that the 1974 amendments do, *ante* at 2472. . . .

# # # #

Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 712-713 (1980) (dissenting opinion of Marshall, J.):

> In short, today's decision represents a usurpation of decision making authority that has been exercised by and properly belongs with Congress and its authorized representatives. The plurality's construction has no support in the statute's language, structure, or legislative history. The threshold finding that the plurality requires is the plurality's own invention. It bears no relationship to the acts or intentions of Congress, and it can be understood only as reflecting the personal views of the plurality as to the proper allocation of resources for safety in the American workplace.

# # # #

State v. Mowery, 1 Ohio St. 3d 192, 203, 438 N.E.2d 897, 905 (1982), *cert. denied*, 466 U.S. 940 (1984) (opinion of Celebrezze, C.J. concurring in part and dissenting in part):

> The bottom line, then, is that the majority opinion, in authorizing Mrs. Mowery to testify against her husband in his prosecution for the murder of Laughlin, is demonstrably incorrect, plainly disingenuous, intellectually dishonest and institutionally flawed. . . .

# # # #

State v. Anderson, 211 Mont. 272, 301, 686 P.2d 193, 208 (1984) (dissenting opinion of Morrison, J.):

> Members of our Court have, by way of dissent, been termed "intellectually dishonest." I find that expression inappropriate to adequately impart the intensity of my opposition to what seems a clear abrogation of judicial responsibility. . . .

# # # #

State v. Wurtz, 195 Mont. 226, 239-240, 636 P.2d 246, 253 (1981), (dissenting opinion of Morrison, J.):

> The majority opinion states: "The decision to apply felony punishments to seemingly harmless conduct rests with the legislature." This startling statement shreds the Constitution, abdicates judicial responsibility, and creates an Imperial legislature.

# # # #

Bork [Judge Robert H.], THE TEMPTING OF AMERICA (FREE PRESS 1990), PP. 30-31 (discussing Justice Taney's opinion in the *Dred Scott* case):

The crucial passage comes near the end of his opinion, and it is as blatant a distortion of the original understanding of the Constitution as one can find.

. . . .

> The second sentence is additionally dishonest because it postulates a man who had "committed no offense against the laws," but a man who brings slaves and keeps them in a jurisdiction where slavery is not permitted does commit an offense against the laws. . . .
>
> Though his transformation of the due process clause from a procedural to a substantive requirement was an obvious sham, it was a momentous sham. . . .

# # # #

Lusky, BY WHAT RIGHT? (Michie 1975), p. 194 (discussing Justice Miller's opinion in the *Slaughter-House* cases):

> Incredible as it may seem, Justice Miller's opinion (1) deliberately misquotes the Constitution in a material respect; (2) trims a quotation from *Corfield v. Coryell* in a manner which obscures the fact that, from his viewpoint, it was harmful rather than helpful authority; and (3) denies, erroneously, that Congress had ever undertaken to define the privileges and immunities of Federal citizenship. . . . examine these points in order.

# # # #

The New York Times, August 17, 1990, section A, p. 28 (letter to the editor from Brian Graifman, a lawyer).

The other judge besides David H. Souter that President Bush interviewed to fill the Supreme Court vacancy, Edith H. Jones of the United States Court of Appeals, Fifth Circuit, is dangerous for reasons beyond her views on death-row appeals. . . .

. . . .

Judge Jones' opinion repeatedly cites the Meese Commission's report on pornography, which was condemned almost universally by scholars and newspapers as biased and intellectually dishonest. By making it a basis for her opinion, Judge Jones calls into question her own integrity.

# # # #

The New York Times, February 25, 1990, section 6, p. 32:

For Alastair Logan solicitor for the defendants, the Appeal Court was a legal charade. "The judges could not bring themselves to believe that terrorists could tell the truth and the police could tell lies," he says. "I got the distinct impression that the final judgment was written beforehand. The answer was no, and the judges worked back to find how they could get there. It was such an intellectually dishonest exercise I do not believe anyone reading it today could believe it was an honest judgment."

# # # #

The Washington Post, July 8, 1979, p. A1 (reporting comments concerning various recent Supreme Court decisions):

"The majority opinion [in *United Steelworkers v. Weber*] was without substantial basis in any way, shape or form" he [Philip B. Kurland of the University of Chicago] charged.

. . . .

A criticism of the decision [in *Gannett Co. v. DePasquale*] by Stanford University's Gerald Gunther was especially notable because he offered it after venting to a reporter his dismay over "doomsday" and "self-defeating" reactions by press groups to earlier rulings involving the First Amendment. "Hysterical," he said "Bizarre, grotesque."

. . . .

Harvard's Tribe found the decision [in *Gannett*] "outrageous" and could "think of nothing to say in [its] defense."

Bruce Ennis, legal director of the American Civil Liberties Union, called it "one of the worst decisions of the Burger court." Prosecutors will have "free rein to offer defendants deals in return for defense support of secrecy," he said.

. . . .

Some of the experts saw in several decisions, including *Gannett*, the extension of a long-term trend among the justices to be "activist" and "result-oriented," with anomalies resulting.

"They do justice as they see it, with out regard to the intent of the framers, the Constitution and their own precedents," Philip Kurland protested in Chicago.

# # # #

St. Louis Post-Dispatch, May 15, 1991, p. 3C (editorial by Judge Stephen Reinhardt of the U. S. Court of Appeals for the Ninth Circuit):

The U. S. Supreme Court is out of the closet. The myth that it is only liberals who are judicial activists stands exposed.

The Supreme Court has never acted in as nakedly activist a manner as did the Rehnquist court last month in a case known as "McCleskey II" (*McCleskey vs. Zant*). . . .

. . . .

Certainly, today's majority is no believer in judicial precedent. Nor does it follow the doctrines of judicial restraint or strict construction. A far different term than conservative is needed to describe the activist right-wing majority that is currently rewriting U. S. constitutional law in its own image.

No. 91-429

In The

Supreme Court of the United States

October Term, 1991

IN RE GEORGE R. WESTFALL.

On Petition for Writ of Certiorari to the Supreme Court of Missouri

BRIEF IN OPPOSITION FOR RESPONDENT MISSOURI BAR ADVISORY COMMITTEE

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QUESTIONS PRESENTED FOR REVIEW[1]

Petitioner was disciplined by the Missouri Supreme Court for violating Rule 8.2(a). Rule 8.2(a) of the Missouri Rules of Professional Conduct provides:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the . . . integrity of a judge . . . .

The question presented is:

Whether the Missouri Supreme Court, consistent with the First Amendment, may discipline a lawyer under Rule 8.2(a) for public remarks about a state judge where the court finds that the lawyer's speech was defamatory under Missouri law, impunging the integrity of the judge and maligning his professional conduct and where the lawyer admits that at the time the speech was made he had no basis to question the judge's integrity or the judge's conduct, and further admits that he made no effort to determine whether or not any of his defamatory statements had any factual basis.

---

1. Petitioner's articulation of the question presented for review constitutes an essential mischaracterization of the case below and an abject misstatement of the findings of the Missouri Bar Advisory Committee, of the Special Master, and the decision of the Missouri Supreme Court. At no time has any finder of fact ever determined that petitioner's attack on the appellate judge was merely "criticizing an appellate court opinion". Each fact finder determined that petitioner was disciplined for attacking a judge's integrity.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Citations ii

Statement of the Case 1

Reasons for Denying the Writ 6

I. The facts of this case do not present any constitutional issue. 6

A. Petitioner Demonstrated Actual Malice. 10

B. Petitioner's Remarks Were Statements of Actual Fact. 11

C. Petitioner's Discipline Does Not Conflict With *Gentile*. 13

D. The Missouri Supreme Court Correctly Applied the *New York Times* Rule. 14

Conclusion 19

TABLE OF CITATIONS

Cases Cited:

Bose Corp. v. Consumer's Union of United States, Inc., 466 U.S. 485, 80 L. Ed. 2d 502, 104 S. Ct. 1949 7

Contents

Page

Bradley v. Fischer, 13 Wall. 335, 20 L. Ed. 646 .....14, 17

Dun & Bradstreet v. Green Moss Builders, 472 U.S. 749 (1984) 8

Garrison v. Louisiana, 379 U.S. 64, 13 L. Ed. 2d 125, 85 S. Ct. 209 8

Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991) 13, 14, 17

Getz v. Robert Welch, Inc. 418 U.S. 323 15

Goldfarb v. Virginia State Bar, 421 U.S. 733 16

Harte-Hanks Inc. v. Connaughton, 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989)..... 18

Hustler Magazine v. Falwell, 485 U.S. 46.....8, 11, 12

In re Ades, 6 F. Supp. 467 (D.C. Md. 1934) 15

In re Donohoe, 90 Wash. 2d 173 (1978) 17, 18

In re Hinds, 90 N.J. 609 17

In re RMJ, 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982) 16

In re Terry, 271 Ind. 449, 394 N.E. 2d 94 (1979), cert. denied, 444 U.S. 1007 18

Contents

Page

Lisenba v. California, 314 U.S. 219, 86 L. Ed. 166, 62 S. Ct. 280 7

Milk Wagon Driver's Union v. Meadowmoor Dairies, 312 U.S. 287, 85 L. Ed. 836, 61 S. Ct. 552 7

Milkovich v. Lorraine Journal Company, ___ U.S. ___, 111 L. Ed. 2d 1, 100 S. Ct. 2695 .....11, 13

New York Times v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710.....5, 7, 9, 10, 14

Patterson v. Colorado, 205 U.S. 454 16

Peel v. Attorney Disciplinary Committee, ___ U.S. ___, 110 L. Ed. 2d 83..... 16

Rosenbloom v. Metro Media, Inc., 403 U.S. 29, 29 L. Ed. 2d 296, 91 S. Ct. 1811 (1971)..... 9

St. Amant v. Thompson, 390 U.S. 727, 20 L. Ed. 262, 88 S. Ct. 1323..... 9

State ex rel. Bulloch v. Seier, 771 S.W. 2d 71 (Mo. 1989) 3, 9

Virginia State Board of Pharmacy v. Virginia Citizens Cons Council, 425 U.S. 748 8

United States Constitution Cited:

First Amendment .....i, 5, 8, 13, 14, 18

Contents

Page

Rules Cited:

Missouri Rules of Civil Procedure:

Rule 4 4

Rule 5 4

Missouri Rules of Professional Conduct:

Rule 8.2 ..... 4, 5, 18

Rule 8.2(a) ..... i, 5, 9, 10, 13, 14

Rule 102(a)(6) 14

Missouri Supreme Court Rule 2, Code of Judicial Conduct, Canon 3(a)(6) 15

APPENDIX

Appendix A — Excerpts from the Transcript of Proceedings of Formal Hearing June 1, 1989 ..... 1a

Appendix B — Excerpts from the Transcript of the Hearing Before the Master 5a

No. 91-429

In The

Supreme Court of the United States

October Term, 1991

IN RE GEORGE R. WESTFALL.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

BRIEF IN OPPOSITION FOR RESPONDENT MISSOURI BAR ADVISORY COMMITTEE

STATEMENT OF THE CASE

On August 9, 1988, speaking for a unanimous Missouri Court of Appeals, Judge Kent Karohl authored an opinion prohibiting the State of Missouri, through the St. Louis County Prosecuting Attorney's office, from proceeding to charge and try one Dennis Bulloch with armed criminal action. The opinion deferred for further fact finding the issue of whether or not such charges against Bulloch were motivated by prosecutorial vindictiveness.[2]

2. The issue of prosecutorial vindictiveness is presently on appeal to the Missouri Court of Appeals, Western District, following Bulloch's subsequent conviction for arson. These second charges, armed criminal action and arson, were instigated by petitioner in this case in his role as Prosecuting Attorney of St. Louis County.

Concurring in the opinion were two other judges of the Court of Appeals, one of whom was a former prosecuting attorney.[3] The prohibition opinion was issued as a result of an underlying first degree murder case judicially described as follows:

> On May 6, 1986, (Bulloch's) wife was asphyxiated when two strips of cloth were placed on her mouth and retained by tape wrapped around her face and over her mouth. The victim died at the family home, in which a fire occurred almost immediately following her death. Indicted on a charge of first degree murder in August, 1986, and a month later on the charge of second degree arson, (Bulloch) was first tried for murder and the state elected to seek the death penalty. At trial, Bullock contended his wife's death was an accident resulting from an episode of consensual sexual bondage, but admitted starting the fire. The jury found the relator not guilty of first or second degree murder, and returned a verdict of guilty on the lesser offense of involuntary manslaughter. Relator was sentenced to a term of seven years imprisonment.
>
> Following the homicide trial, (Bullock) was indicted on additional charges of armed criminal action and tampering with physical evidence . . . In response to a motion to dismiss that indictment, the State contended that the tape and gag constituted a dangerous instrument. (The trial court) overruled (Bulloch's) motion to dismiss which was based on claims of double jeopardy, collateral estoppel,

---

3. In petitioner's attack on Judge Karohl, he made no attack on either of the concurring judges.

absence of legislative intent, and denial of due process in the form of prosecutorial vindictiveness.

State ex rel. Bulloch v. Seier, 771 S.W. 2d 71 en banc (Mo. 1989).

Immediately after learning of the appellate court opinion, petitioner, without making an investigation of any kind, spoke to a television reporter. At that time petitioner knew that Judge Karohl was a man of impeccable personal integrity (Tr. 66-5 to 6) and was "a fine man" and a "fine judge", and petitioner knew that Judge Karohl was not engaging in and had not engaged in any act of professional misconduct, nor violated his judicial oath. Petitioner Westfall spoke to the press without any studied consideration or research. He did not examine any records or reported decisions to determine whether or not Judge Karohl had ever decided an armed criminal action case before, nor did he make any effort to determine whether or not there was a pattern to Judge Karohl's decisions in criminal cases.[4]

Armed with actual knowledge that Judge Karohl was a man of impeccable integrity and faithful to his oath and office, petitioner nonetheless, on television, set out to and personally attacked Judge Karohl referring not to the opinion, but specifically to Judge Karohl, utilizing in each instance either the judge's name or the personal pronoun (App. 62, Master's Findings, 26). Respondent communicated to the television public: (1) That Judge Karohl failed to follow the "Supreme Court of the Land"; (2)

---

4. Westfall's assertion in the hearings that he simply intended to convey that Judge Karohl's judicial bent to begin with "is far too liberal to suit him" is intriguing. Any research into this *ex post facto* justification would have revealed that Judge Karohl, during the time he has been on the Missouri Court of Appeals for the Eastern District, almost invariably votes to affirm criminal convictions and to deny post-conviction relief. A simple check would have revealed that this "liberality" is manifested in a pattern definitively favoring the prosecution.

that Judge Karohl really distorted the statute to arrive at a decision he personally likes; (3) that Judge Karohl made up his mind before he got the case; (4) that the decision he reached was a conclusion that he personally wanted to arrive at; and (5) that all of this was done for "reasons a little bit less than honest" (App. 59, Master's Findings, 21, 40, 41).

Following two television showings of his remarks, lawyers and others called Judge Karohl to question whether or not petitioner's attacks were true and whether or not those attacks would have the effect of influencing or coercing future court decisions (MBA Exhibit 1, P28-29; App. 60, 90-91). At the same time, various lawyers called to either petitioner's attention or his employees' attention the fact that petitioner had unjustifiably accused Judge Karohl of being dishonest (Tr. 83, Resp. App. 7a).

Following complaints received by members of the bar based on this unwarranted attack, the Missouri Bar Advisory Committee, in accordance with Rules 4 and 5 of the Missouri Rules of Civil Procedure, conducted an investigation; took evidence and determined that George R. Westfall was guilty of a violation of Rule 8.2, finding that he had made a statement, knowing the statement to be false, and that he had made statements with reckless disregard as to their truth or falsity, all of which concerned the integrity of a judge. Petitioner refused to accept his punishment, as a result of which an information was filed with the Missouri Supreme Court.

A second hearing was then held before a Special Master who, after hearing the evidence, arguments, and briefs of counsel, rendered his recommendation. The Special Master found: (1) that respondent knew and believed that the judge "was a man of personal and professional integrity"; (2) that respondent's statement exposed the judge to hatred, ridicule or contempt, and reflected unfavorably on his personal morality and integrity; (3)

that the statement falsely imputed fraud, want of integrity, and misconduct in the judge's professional work; (4) that the statement falsely imputed criminal conduct; (5) that the statement disparaged the judge; (6) that the statement disparaged the Court of Appeals in its function in the administration of justice. The Master further found "that respondent made the statement with malice, *i.e.*, knowing its falsity or with reckless disregard of its truth or falsity.

Applying the law to these fact findings, the Master concluded that petitioner's statement violated Rule 8.2 and that the application of the rule was not "unconstitutional" as a violation of the free speech clause of the First Amendment (Master's Rulings, 40-41, App. 73, 74). The Master's analysis was based upon his determination that the statements were, in fact, defamatory (App. 58-64); that they were, in fact, false (App. 65-66); and that the requirement of malice articulated by the *New York Times* rule was met (App. 66-67)

Following rendition of the Master's report, exceptions were filed and the matter was then reviewed. The Missouri Supreme Court affirmed the Master's finding that petitioner violated Rule 8.2(a) of the Missouri Rules of Professional Conduct and affirmed both the fact findings and the rationale utilized by the Master. Contrary to petitioner's statement, the Missouri Supreme Court affirmed the Master's use of the *New York Times* requirement of malice, finding that the Master was correct when he determined the statements to be defamatory and to have been made either knowingly or with reckless disregard as to their truth or falsity.

Both the Special Master and the Misssouri Supreme Court rejected petitioner's "retrostatements" as a defense, determining that respondent's post-defamation characterizations of his intention were not supported by the facts, *i.e.*, were not believable, and that his subjective protestations of innocent intent were not persuasive (and, in fact, objectively not true).

REASONS FOR DENYING THE WRIT

I.

THE FACTS OF THIS CASE DO NOT PRESENT ANY CONSTITUTIONAL ISSUE.

The first four sentences of respondent's petition articulating the "questions presented for review" clearly illustrate that this case does not present an appropriate vessel for the examination of any issue. Petitioner in these four sentences attempts to mislead this Court as to the basis on which petitioner was disciplined. His request refuses to honestly acknowledge the basis on which discipline was imposed. Instead, petitioner distorts his case by asserting "a state Supreme Court disciplined a lawyer under its ethics rule for publicly criticizing an appellate court opinion." Respondent respectfully suggests that a petition for certiorari which refuses to candidly state the issue cannot be a proper basis on which to examine any real or manufactured constitutional issue.

The Missouri Supreme Court addressed as its first order of business petitioner's assertion that he criticized the opinion as opposed to the judge. That defense, *i.e.*, "I criticized the opinion, not the judge", was first presented to the Advisory Committee and rejected; then to the Master and rejected; and then specifically rejected by the Supreme Court when it stated:

> This Court first addresses respondent's protestations that his statements were merely expressions concerning the soundness of the Court of Appeals decision, not statements of actual provable facts about the judge's integrity. His contentions are not well taken . . . The statements personalized the judge's conduct and specifically referred to him, his motivation, and his integrity

> as it relates to his participation in the appellate judicial process.

(App. 5).

This Court traditionally accepts the fact findings of the courts below on issues of disputed facts and then, having accepted the conclusion of a state court as to the facts of a situation, only examines the federal constitutional implication of those facts. *See, e.g., Milk Wagon Driver's Union v. Meadowmoor Dairies,* 312 U.S. 287, 293-294, 85 L. Ed. 836, 841-842, 61 S. Ct. 552; *Lisenba v. California,* 314 U.S. 219, 238, 86 L. Ed. 166, 180, 62 S. Ct. 280.

It is inappropriate to accept as a vehicle of constitutional interpretation a case which is framed on a false premise. Factually, the essence of this petition is the claim that if this Court will only believe and accept petitioner's statements as true, and believe what petitioner now says he intended when he made his statement, and if it will only accept his characterization and colorization of the content of his speech, then the Court will find that speech to be protected. This Court has not, since *New York Times v. Sullivan,* 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, examined the factual questions of whether or not a statement is defamatory, nor whether or not the statement is false. Rather, this Court has limited itself to a factual review as to whether or not "the evidence in the record in a defamation case is sufficient to support a finding of actual malice" since that question is a question of law. *Bose Corp. v. Consumer's Union of United States, Inc.,* 466 U.S. 485, 510-511, 80 L. Ed. 2d 502, 104 S. Ct. 1949.

Before any cognizable constitutional issue is presented here, this Court would have to reject the findings of the Missouri Bar Advisory Committee, the findings of the Special Master, and the findings of the Missouri Supreme Court as to the substance of and effect of petitioner's statement and reject the conclusion that

"respondent's statement imputed a lack of integrity and misconduct in the judge's professional work" (App. 16).

The fact findings "unmistakably" require the conclusion that no constitutional issue exists. It is unquestionably true that the significant values behind the First Amendment require tolerance of a merely erroneous utterance. *Garrison v. Louisiana,* 379 U.S. 64, 13 L. Ed. 2d 125, 85 S. Ct. 209. "Untruthful speech, commercial or otherwise, has never been protected for its own sake." *Virginia State Board of Pharmacy v. Virginia Citizens Cons Council,* 425 U.S. 748, 771.

Indeed,

> False statements of fact are particularly valueless: they interfere with the truth-seeking function of the marketplace of ideas and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective.

Hustler Magazine v. Falwell, 485 U.S. 46, 49.

As the Master noted (App. 56):

> Free speech values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government.

Justice White, *Dun & Bradstreet v. Green Moss Builders,* 472 U.S. 749, 767 (1984).

The facts in this case are that respondent's personalized attack on the appellate court judge was defamatory under Missouri state law (A-58-65) and false (A-65-66), and was made with "actual malice" as defined in *New York Times Co. v. Sullivan* and later cases. This Court should accept the factual determinations that the statement made was both defamatory and false. *St. Amant v. Thompson,* 390 U.S. 727, 730, 20 L. Ed. 2d 262, 88 S. Ct. 1323.

The maximum protection this Court has ever extended to false defamatory statements about a public official is the *New York Times* addition of the requirement that the defamatory falsehood be made "with actual malice — that is, with knowledge that it is false or with reckless disregard of whether it was false or not."[5]

Rule 8.2(a) of the Missouri Rules of Professional Conduct under which petitioner was disciplined requires that precise finding, to wit, that the statement "be false or (made) with reckless disregard as to its truth or falsity . . . "

In order to create facial appeal, in the language of the Missouri Supreme Court, "respondent seeks to obfuscate the issue" (App. 6). Petitioner admittedly knew at the instant of his speech that the appellate judge he was about to vilify was, in truth and fact, a person of impeccable integrity who had engaged in no personal or professional misconduct with respect to the rendition of the *Bulloch* opinion. In light of this fact, there is no argument that petitioner uttered his defamatory remarks with "actual malice." This case requires no constitutional confrontation.

---

5. The phrase "actual malice" as used in *New York Times* is not at all related to bad motive or ill will and does not require any evidence of bad motive or ill will. *Rosenbloom v. Metro Media, Inc.*, 403 U.S. 29, 52 note 18, 29 L. Ed. 2d 296, 91 S. Ct. 1811 (1971), opinion by Justice Brennan.

A. Petitioner Demonstrated Actual Malice.

New York Times requires "a false statement of fact which was made . . . with knowledge that the statement was false."

It is without doubt that at the time the petitioner accused Judge Karohl of deliberate dishonesty and of purposefully ignoring the law to achieve his own personal ends (App. 6) that petitioner, in fact, knew that Judge Karohl was a man of impeccable integrity who had not engaged in any misconduct in the performance of his job (Excerpts from Transcript of Formal Hearing, Resp. App. 1a-2a). *See also,* Special Master's Findings of Fact (App. 70, 73). Petitioner does not claim that he made statements of fact which were true. Indeed, petitioner must concede that if what he says is a "statement of fact", then it was false because at the time petitioner made the statement he admittedly knew that the judge had not engaged in professional misconduct, and he affirmatively knew the judge to be a man of impeccable integrity.

This reality terminates the constitutional consideration, for what petitioner actually argues is that he did not make a "statement of fact." Petitioner's entire assertion is based upon his colorization of the true, *i.e.*, his assertion that all he did was "criticize an appellate court opinion." Therefore, petitioner's complaint is not with the standard contained in Rule 8.2(a), but with the Missouri law as to what constitutes defamation. Petitioner's true request is that this Court take what he intended to say or what he wanted to say and find that the language does not constitute a "statement of fact." As previously noted, this function is outside the role of the petition for writ of certiorari. No question exists in this case as to the definition of "reckless disregard." No question exists in this case as to whether or not the evidence justifies a finding of "actual malice" because the respondent has provided unmistakable evidence that at the time the speech was made petitioner actually knew it was false. That is, petitioner had "actual

knowledge" that Judge Karohl had not engaged in professional misconduct and was a man of impeccable integrity.

B. Petitioner's Remarks Were Statements of Actual Fact.

The asserted conflict with *Milkovich v. Lorraine Journal Company* does not withstand analysis. *Milkovich* specifically declines to add "an additional separate constitutional privilege for 'opinion' ." *Milkovich v. Lorraine Journal Company*, ____ U.S. ____, 111 L. Ed. 2d 1, 19, 100 S. Ct. 2695. *Milkovich* also specifically rejects the "artificial dichotomy" between opinion and fact.

Milkovich simply asks:

> The dispositive question in the present case becomes whether or not a reasonable fact finder could conclude that the statements in the Diadiun column imply an assertion that petitioner *Milkovich* perjured himself in a judicial proceeding.

111 L. Ed. 2d at 19.

Milkovich, in fact, holds that there is a line of cases represented by *Hustler Magazine v. Falwell, supra* that "provide protection for statements that cannot 'reasonably (be) interpreted as stating actual facts' about an individual." 111 L. Ed. 2d at 19. Thus, the parody and hyperbole or exaggerated response talked about in *Hustler, supra* is protected.

Westfall does not run afoul of *Milkovich*, nor of this constitutional standard. As pointed out in *Hustler*, 485 U.S. 46, 57, 99 L. Ed. 2d 41, 53, 108 S. Ct. 876:

> The jury found against respondent on his libel claim when it decided that the Hustler ad parody could not reasonably be understood as describing actual facts about (respondent) or actual facts in which (he) participated . . . The Court of Appeals interpreted the jury's finding that the ad parody was not reasonably believable . . . and *in accordance with our custom we accept this finding.*

(Emphasis added).

The Special Master determined that the statements made were statements of fact (App. 67-72) and specifically held that the statements made were "sufficiently factual to be susceptible of being proved true or false." The Missouri Supreme Court concurred:

> Respondent's statements clearly imply an assertion of objective fact regarding Judge Karohl's judicial integrity . . . Respondent's language, at the very least, implies that the judge's conduct exhibited dishonesty and a lack of integrity and is sufficiently factual to be susceptible of being proved true or false.

(App. 6). It is to this fact finding that this Court "customarily defers." *Hustler, supra.*

Contrary to petitioner's assertion, this is not a lawyer giving vent to his disappointment in tavern or press. This is a lawyer who stated that a judge had prejudged a case for his own personal reasons and that, in doing so, the judge was "a little bit less than honest." Deciding a case for "dishonest reason" is, in fact, a direct assertion that the judge "was corrupt or venal . . . ."

The petitioner's statements have been found to be statements impugning Judge Karohl's integrity and professional conduct. These are provable objective facts. Petitioner himself recognized this when he admitted that Judge Karohl did not lack integrity. Only under petitioner's distorted version of his words is there even a hint of a constitutional question under *Milkovich*. In truth, there is no constitutional question.

C. Petitioner's Discipline Does Not Conflict With *Gentile*.

Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991) does not suggest a grant of certiorari. *Gentile* deals only with pretrial publicity and relates only to the ability of a state to discipline a lawyer for what was claimed to be an extrajudicial statement that the lawyer knew or should know would have a likelihood of materially prejudicing an adjudication. Nothing in *Gentile* remotely relates to a diciplinary rule that prohibits a defamatory falsehood made with knowledge that the defamation was not, in fact, true, or made with reckless disregard to the truth. The concern in *Gentile* was the proper balancing of an attorney's First Amendment rights with the defendant's right to a fair trial and to due process.

Westfall is in no way related. A false defamatory statement made with actual malice in the context of a trial or in the context of pretrial publicity finds no solace in *Gentile*. Were it charged that Westfall's statements violated the rule prohibiting pretrial publicity, then in order to constitutionally discipline Westfall under *Gentile*, the content of the statement wuld have to meet the *Gentile* criteria. Nothing in *Gentile* permits the conclusion that, to the extent *Gentile* speaker's pretrial comments were also defamatory falsehoods made with actual malice, a disciplinary action against the speaker could not be maintained under Rule 8.2(a).

To look to *Gentile* and to assert that there is some requirement that the criticism must prejudice an adjudicative proceeding is simply to grasp at straws.

The limitations imposed on a lawyer's speech by Rule 8.2(a) have a constitutional basis. Defamatory falsehoods made with malice are outside of the limitation formulated from *Gentile*.

D. The Missouri Supreme Court Correctly Applied the *New York Times* Rule.

To urge in this case that the Missouri Supreme Court decision provides a vehicle to resolve what petitioner claims to be differing standards among the states is to ignore that the standard utilized was purely that of *New York Times*. As an umbrella under which to examine the constitutionality of all regulation of lawyer speech, this case is inappropriate. Because the speech in this case is defamatory, there is no need to engage in any balancing.[6]

In this case, it was not necessary to determine the meaning of "reckless disregard." Nevertheless, the Missouri Supreme Court did articulate the proper standard for determining "reckless disregard." From the very beginning, it has been recognized that reckless disregard cannot be fully encompassed by one infallible definition. The Missouri court properly weighed the value of the First Amendment right to communicate to the public with the state's interest in the administration of justice. The court's approach imposed only minimal restrictions on the lawyer's speech.

This Court has repeatedly recognized that an attorney does not have an unlimited right to criticize judges. In *Bradley v. Fischer*, 13 Wall. 335, 355, 20 L. Ed. 646, 652 this Court stated:

---

6. Petitioner asserts that this case presents a common question of law referring to *Holtzmann*, No. 91-409. That claim is preposterous. *Holtzmann* was disciplined under Rule 102(a)(6) proscribing conduct that adversely reflects on a lawyer's fitness to practice law. Since that rule contains no specific standard for a lawyer's speech, no common question of fact or of law exists.

> But . . . the obligations which attorneys impliedly assume . . . is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to Courts of justice and judicial officers . . . It includes abstaining out of Court from all insulting language and offensive conduct toward the judges personally for their judicial act.

This fact was also articulated in *In re Ades*, 6 F. Supp. 467, 481 (D.C. Md. 1934):

> An attorney does not surrender . . . his right as a citizen to criticize the decisions of courts in a fair and respectful manner, and the independence of the bar, as well as of the judiciary, has always been encouraged by the courts. But the right of fair criticism does not carry with it a liberty to indulge in false and malicious assault upon the integrity of the courts, or to charge a court or judge with corruption, willful partiality, or sinister motives in the trial and decision of cases.

This Court has long been aware of the state's interest in the administration of justice. This Court has recognized the function of the American judicial system depends upon the acceptance by the public of the decision of a jury, a judge, or a court. Once falsely accused, the judge has no voice because he is "required to abstain from public comment about a pending or impending proceeding in any court." Mo. Sup. Court Rule 2, Code of Judicial Conduct, Canon 3(a)(6). Thus, while judges and the judiciary as a whole must be "thick-skinned" and should not shy away from criticism, neither may the judiciary defend itself. One of the reasons for lack of public figure protection voted by this Court in *Getz v. Robert Welch, Inc.*, 418 U.S. 323 was the access of the public official to communication and "a more realistic

opportunity to counteract false statements." That rationale is not available to the wrongfully attacked member of the judiciary.

This Court has examined state regulation of free speech in the commercial speech area. *See, e.g., Goldfarb v. Virginia State Bar,* 421 U.S. 773. The Court there invited a balancing test, noting that:

> The interest of the states in regulating lawyers is especially great since the lawyers are essential to the primary governmental function of administering justice.

Id. at 792.

Mr. Justice Holmes in *Patterson v. Colorado,* 205 U.S. 454 at 463 stated:

> . . . The propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation, can hardly be denied.

Even more recently in *Peel v. Attorney Disciplinary Committee,* ____ U.S. ____, 110 L. Ed. 2d 83, the Court continued to recognize that the state may absolutely ban speech that is "misleading." *Goldfarb, supra, In re RMJ,* 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982) and *Peel, supra,* as a group recognized not only the right, but the necessity that the public not be misled, that the speech be true. Thus, this Court recognized that the state has a right to proscribe false and defamatory speech directed at the professional conduct and integrity of a sitting judge who may not ethically respond. This is the undeniable "propriety and necessity" referred to by Mr. Justice Holmes.

Lawyers' speech can uniquely affect the administration of

justice. Lawyers have considerable credibility in speaking of judges and litigation, a fact recognized by this Court in *Gentile*. Because of this enhanced credibility, it is necessary to take some measures to ensure that lawyers speak the truth. One such measure is to hold a lawyer accountable for defamatory statements when the lawyer's only justification is a subjective protestation of "I didn't intend to." Lawyers should not be allowed to clothe themselves in ignorance, cry "good faith", and avoid discipline for defamatory statements of fact which are actually false.

To require that a false publication be made with "a high degree of awareness of probable falsity" or to require the disciplinary agency to prove that the speaker "entertained serious doubt as to the truth" requires too much. A lawyer, like the patron in the movie theater, should not be allowed to cry "fire" and then avoid the consequences of his act by asserting that he thought everyone would know he was joking.[7] It could not be argued that to falsely cry "fire" was to act in "reckless disregard" for the truth. No reference to nor proof of state of mind is required any more than ill will or spite would be required. The reckless conduct then within the context of the disciplinary rule recognized by this Court in *Bradley v. Fischer* should require only that the "recklessness" be measured against the standard of the reasonable professional.

To so hold would create no conflict with any other state. Surely a state is free to apply a more speech protective test. One in New Jersey, for example, in *In re Hinds*, 90 N.J. 609, appears to require clear and present danger or serious and imminent threat in other than a criminal proceeding. Washington apparently extends a requirement of "knowledge of falsity", *In re Donohoe*,

---

7. The analogy is particularly appropriate if, like the lawyer who is intimately involve with the judicial process, the patron who cried "fire" was seated next to the furnace.

90 Wash. 2d 173, 181 (1978).

The constitutional mandate is that the restriction or limitation on speech be the minimum necessary to accomplish the state protected interest. Rule 8.2 accommodates that test by requiring that the defamatory statement be made with actual knowledge or reckless disregard.

The state interest would involve significant societal interest in the adjudicatory process — an interest which must be protected for the benefit of the public as a whole. For, as stated in *In re Terry*, 271 Ind. 449, 502, 394 N.E. 2d 94-95 (1979), *cert. denied*, 444 U.S. 1007, the false accusation against the judge works a perversion of the judicial process and "the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it was evolved for generations." A balancing of interest clearly permits determination of recklessness based on an objective standard.

The "objective/subjective" characterizations made by petitioner are, in fact, a red herring. Even in the court's opinion, Justice Covington did not use a negligence standard. The Missouri Supreme Court, when it agreed with the Supreme Court of Minnesota that a purely subjective standard was inappropriate and that an objective standard would survive First Amendment scrutiny (App. 15), did not adopt a negligence standard. Rather, it recognized that one must look objectively at what other lawyers do as evidence of recklessness. In a private defamation action, this Court has consistently permitted proof of "state of mind" by the use of circumstantial evidence and this Court has stated ". . . it cannot be said that evidence concerning . . . care never bears any relation to the actual malice inquiry." *Harte-Hanks Inc. v. Connaughton*, 491 U.S. 657, 668, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989).

Thus, while embracing that concept in dicta, the Missouri

Supreme Court was not required to and did not measure that "state of mind" by reference to the bar as a whole. For here, petitioner admits that at the time he made his statement, he knew that Judge Karohl had not engaged in professional misconduct and that, in fact, he was a man of impeccable personal integrity. Having made that admission and thereafter having even informally apologized to the judge in question, it cannot be said that petitioner's speech was not, at the very least, reckless.

CONCLUSION

Westfall, in this case, actually asks this Court to determine that his speech was not defamatory because he intended only to attack an appellate opinion based on what he perceived to be a history of appellate dislike for Missouri's armed criminal action statute. Had petitioner ever been believed, we would not now be here. Every fact finder who has had the opportunity to judge the credibility of the petitioner has rejected this assertion. Every fact finder has recognized that the statements are, in fact, defamatory, falsely imputing criminal conduct; falsely imputing fraud, want of integrity or misconduct in the judge's work. Such statements are clearly beyond the constitutional pale.

The case truly presented by petitioner seeks only to reargue fundamental facts found against him. That is not an appropriate function for certiorari.

The petition for the writ must be denied.

Respectfully submitted,

JOHN L. OLIVER, JR.
OLIVER, OLIVER, WALTZ &
COOK, P.C.
Attorneys for Respondent
Missouri Bar Advisory Committee

APPENDIX A — EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS OF FORMAL HEARING JUNE 1, 1989

MISSOURI BAR ADMINISTRATION BEFORE THE ADVISORY COMMITTEE OF THE STATE OF MISSOURI

File No. 2281

In Re: George "Buzz" Westfall

Page 60, Lines 11 through 16

> Q. State your name and address please. A. Home address? George Westfall, 2315 Gate Royal, St. Louis, Missouri 63131.
>
> Q. Mr. Westfall, your're a lawyer licensed to practice law in the State of Missouri? A. Yes.

Page 66, Lines 2 through 3

> I have respect for Judge Karohl.

Page 66, Lines 5 through 6

> But as far as his personal integrity - I don't question that in the least.

Page 83, Lines 3 through 4

> It never entered my mind to question Judge Karohl's personal integrity. . .

Appendix A

Page 83, Lines 9 through 10

> That was the thrust of the newscast that I disagreed with his opinion,. . .

Page 78, Lines 19 through 25; Page 79, Lines 1-3

> A. Sure. I told Judge Karohl this before we came in here, I saw him and I did something I've been wanting to do but I don't see him often, I went over to say good morning to him and if he seemed okay to shake his hand. I said Judge, I want to say to you face-to-face, not to influence the outcome of this hearing but we're here, I did not mean to impune or to question your personal integrity and I feel badly if that's the inference you drew or your family or some of your friends or colleagues have drawn.

* * *

Page 5, Lines 22 through 25

QUESTIONS BY MR. SCULLY:

> Q. I'll ask you at this time please state your full name. A. Kent Erwin Karohl.

Page 6, Lines 1 through 5

> Q. Your occupation, sir? A. I am an attorney and now a judge for the Missouri Court of Appeals, Eastern District.

Appendix A

Q. How long have you been an attorney, sir? A. 1958. 31 years.

Page 7, Lines 12 through 18

Q. Do you recall the circumstances under which that opinion was rendered; was it done by you or done in banc by three judges? A. I wrote the opinion, circulated the original, there were some suggested changes that were made and this is the result after considering those suggestions.

Page 9, Lines 7 through 25; Page 10, Lines 1 through 14

Q. Judge, did you at the time of signing this particular opinion have any personal interest or preference in the outcome of the case? A. Absolutely not.

Q. Did you know either of the parties? A. I knew Judge Seier.

Q. Would there have been any particular reason you would have ruled in favor of Judge Seier either as a friend or confidant? A. Absolutely not. I only know him in a professional way, he's a judge, we have heard cases in Cape Girardeau, we've used his office to put on robes, in fact I think we may have had dinner at his home, that is all the judges from our court who were down in that area at the time of the hearing, not on this occasion or anything connected to this case but I don't know him

personally, I only know him as a judge.

Q. To your knowledge did any judge have a preference one way or the other with regard to this case that participated in this opinion? A. Any accusation or allusion that I or any of the judges in this case had any interest or preference in the outcome is absolutely false.

Q. Was there any act by you or any other member of the Court of whom you are aware with regard to the management of the case or preparation of the opinion that would be quote less than honest or dishonest, close quote? A. Absolutely not.

Q. This probably is repetitious but did you know Dennis Bulloch? A. I don't know anything about the man other than by name.

APPENDIX B — EXCERPTS FROM THE TRANSCRIPT OF THE HEARING BEFORE THE MASTER

IN THE SUPREME COURT OF MISSOURI
EN BANC

No. 72022

In the Matter of:

GEORGE R. ("BUZZ") WESTFALL

Page 36, Lines 16 through 20

> Q. And in 1982 and in every time since 1982 have you not been aware that Rule 8.2 exists and that it prohibits false comments and comments made in reckless disregard as to the truth? A. Yes.

Page 43, Line 6

> Q. Mr. Westfall, you, in fact, have stated that —

Page 44, Lines 1 through 24

> Q. Did you ever read any of the prior armed criminal action opinions on which Judge Karohl sat on the panel to determine whether or not he said things like he regretted that he might have to follow what our constitution says is the rule of law in this state, i.e., the decisions of the Missouri Supreme Court? Did you ever look to see, before you accused him of prejudging the case,

to see if he had expressed other opinions about armed criminal action? A. No.

Q. Did you go out and ask the ladies and gentlemen of the press or call on your own office to review the press clippings in either the St. Louis Post Dispatch or — I can't remember the dates that the Globe has been in or out of business at that particular time — to look at any of those press clippings to see if Judge Karohl had ever made any public announcements about his personal opinion about armed criminal action? A. No.

Q. In fact, you didn't do anything in terms of researching Judge Karohl's personal opinions, is that correct? A. On armed criminal action?

Q. On armed criminal action. A. No.

Page 46, Lines 9 through 25; Page 47, Line 1 through 2

Q. You said reasons that were less than honest. You did not say reasoning, correct? A. Did not say what?

Q. You said reasons that were less than honest, not reasoning that was less than honest? A. Correct.

Q. Reasons. A. Right.

Q. And you are aware that after this press conference and after this was disseminated, lawyers

known to you came into this courthouse and made inquiry as to why you had accused Judge Karohl of being a dishonest judge, and in fact asked one of your staff members to provide you with a copy of the tape so you could see what you said? A. Two or three lawyers mentioned this to a couple of my prosecutors that I'd suggested that Judge Karohl was dishonest, so it astounded me because I knew I hadn't said that, or I felt I hadn't suggested that; so I got a hold of the tape. That's correct.

Page 48, Line 10 through 25

I want to ask you in your own defense, if you can, to explain why you say to the press that Judge Karohl prejudged this case to reach a result that he personally wanted? A. I was giving my opinion as to the decision of the overall context historically and recently of the armed criminal action statute, that the appellate judges of this state have repeatedly beat down the armed criminal action statute.

Q. How do you know that he likes this? I mean, you accused him of liking it; how do you know he liked it, sir? A. I told you before it was my opinion based on prevailing opinion among prosecutors as to Judge Karohl's judicial bent regarding criminal statutes, the historical situation with the appellate courts concerning armed criminal action.

Appendix B

Page 52, Lines 6 through 25; Page 53, Line 1

I felt that Judge Karohl would find some way to say that we could not pursue armed criminal action because of the history of the case, of the statute, and just my impression of Judge Karohl's approach to criminal law in general.

Q. Mr. Westfall, I am sure some people would agree with you that those *Sours* opinions were, perhaps, intellectually dishonest; and you say you anticipated the opinion of the appellate court might again be intellectually dishonest. However, my inquiry is: In what respect was this opinion by Judge Karohl intellectually dishonest? In what manner was it intellectually dishonest of its treatment of the legal issues which were before the Court? A. I don't feel that the State should be barred from trying the armed criminal action in the subsequent case. I think since the State is barred in the first case by Missouri law, that the State should then be allowed to pursue it in the second case. If, in fact, the State were allowed to pursue it in the first case, I would feel differently. Every other companion charge is allowed to be brought up in a subsequent trial; we did that.

No. 91-429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

In re GEORGE R. WESTFALL,

Petitioner.

On Petition For a Writ of Certiorari to the
Supreme Court of the State of Missouri

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Discussion	1
Conclusion	7

TABLE OF AUTHORITIES

Page

Bose Corp. v. Consumers Union of United States, 466 U.S. 485 (1984) 5

Garrison v. State of Louisiana, 379 U.S. 64 (1964) 3

Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991) 5

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 6

No. 91-429

IN THE

Supreme Court of the United States

October Term, 1991

IN RE GEORGE R. WESTFALL,

Petitioner.

REPLY BRIEF FOR PETITIONER

Respondent's opposition hardly addresses, let alone refutes, the main points demonstrated in the petition for certiorari: that this case presents an important, unresolved and frequently recurring First Amendment issue, on which state supreme court decisions conflict; and the lack of definitive guidance from this Court poses serious difficulties for lawyers having multi-state aspects to their practices. Respondent mainly attempts to obfuscate the facts and issues of this case and what the Missouri Supreme Court did below. We respectfully submit this reply to address the essential premises of respondent's opposition, all of which are demonstrably false.

1. Respondent contends that the petition raises no genuine constitutional issue because it assumes that the sole basis of Westfall's discipline was his criticism of an appellate court opinion when, in fact, he was disciplined for criticizing a judge. Opp. 6. Contrary to respondent's assertions, however, the petition contains no such misstatement of the facts or issue.

While we believe that the majority below erred in concluding that Westfall's critical remarks extended beyond the appellate court's opinion to implicate the integrity of the authoring judge, the principal constitutional issue raised by the petition in no way depends upon that distinction. Westfall's challenge to the Missouri Supreme Court's refusal to follow *New York Times* is expressly and unambiguously predicated on the majority's premise that his comments may be viewed as relating to the judge personally. Thus, the introductory paragraph to the questions presented states that "the supreme court viewed [Westfall's remarks] as reflecting adversely on the authoring judge." Pet. i. Similarly, the first question presented reads:

> Whether the First Amendment bars a State from disciplining a lawyer *for publicly criticizing a judge*, where the lawyer's criticism does not contain false statements of fact made with "actual malice" within the meaning of *New York Times Co. v. Sullivan*, and the criticism could not have prejudiced any adjudicative proceeding." (emphasis added).

Indeed, the *New York Times* test, by definition, applies only to statements which are potentially defamatory of some *person* or *entity*. The test has no application to remarks which merely criticize an opinion, writing or idea. The constitutional question posited above arises because, and only because, Westfall's petition assumes *arguendo* that his remarks may be viewed as pertaining to Judge Karohl himself.

2. Respondent further contends that no constitutional issue regarding the applicability of *New York Times* arises in this case because "the standard utilized was purely that of *New York Times*." Opp. 14. This argument is highly disingenuous. The Missouri Supreme Court began its analysis in the general direction of *New York Times*, stating that what Rule 8.2(a) proscribes are false statements impugning the qualifications or integrity of a judge "made with knowledge of the statements' falsity or in

reckless disregard of their truth or falsity." Pet. App. 13. From there, however, the court expressly departed from *New York Times*.

Focusing specifically on the reckless disregard component of the test, the court observed that in defamation cases directly covered by *New York Times* and its progeny, "the standard has consistently been a subjective one—the test not being whether a reasonably prudent person would have had serious doubts as to the truth of the publication, but whether the defendant in fact entertained such doubts." Pet. App. 13. The court then stated that it was not clear that the same test for reckless disregard should apply in disciplinary proceedings, while noting that *Garrison v. State of Louisiana*, 379 U.S. 64 (1964), indicates that it should, and further noting the substantial conflict among various state and federal courts on the issue. Pet. App. 13-14.

Ultimately, the court concluded that the proper test for reckless disregard in professional disciplinary proceedings is *not* the subjective *New York Times* test of whether the defendant in fact entertained serious doubts as to the truth of his statements, but "an objective one, dependent on what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." Pet. App. 14. The court then proceeded to apply the objective standard to petitioner's conduct to determine whether he acted with reckless disregard, and concluded that he did because he "failed to investigate" before speaking out. Pet. App. 16. In so concluding, the majority left no doubt that it was applying an objective test for reckless disregard rather than the subjective *New York Times* standard.

3. Respondent strains to construct an argument that Westfall's remarks were made with actual knowledge that they were false, that the court below so found, and that the proper test for reckless disregard, therefore, is irrelevant to this case. The reasoning underlying respondent's argument goes as follows: Westfall's remarks connoted that Judge Karohl engaged in "deliberate dishonesty" and "professional misconduct." Yet, Westfall testified

that he respected Judge Karohl and did not question his personal integrity. Therefore, Westfall had actual knowledge that his remarks criticizing Judge Karohl were false. Opp. 10-11.

Among the fatal flaws in this argument is that the Missouri Supreme Court declined to embrace it, despite respondent's advancing it below. The court's opinion is totally devoid of any finding that Westfall knowingly made any false statements.[1] Indeed, the court went to great lengths to avoid basing its decision on any such factual finding. It was for this reason that the court reached the "reckless disregard" component of the *New York Times* standard and, in doing so, adopted the "objective" determination of "reckless disregard" that is the basis of Westfall's petition in this case. Respondent cannot now avoid that result by positing a nonexistent rationale for the state supreme court's ruling.[2]

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[1] While the special master below did subscribe to respondent's argument (Pet. App. 65-66), that is of no significance here since the Missouri Supreme Court heard this case *de novo* and failed to make or adopt any such finding. On review here is the decision of the Missouri Supreme Court, not findings of the master which the court declined to adopt.

[2] Nor, in any event, would the record in this case have supported any such factual finding. Westfall simply testified that he respected Judge Karohl and did not question his personal integrity in the least. Resp. App. 1a. Respondent, therefore, takes substantial license with the record in arguing: "Petitioner admittedly knew at the instant of his speech that the appellate judge he was about to vilify was, in truth and fact, a person of impeccable integrity who had engaged in no personal or professional misconduct with respect to the rendition of the *Bulloch* opinion." Opp. 9. Respondent's use of the record also is internally inconsistent and borders on the Kafkaesque. While accepting Westfall's testimony that he believed Judge Karohl to be an individual of integrity, respondent condemns as unworthy "retrostatements" Westfall's simultaneous assertion that he, accordingly, did not intend to impugn the judge's integrity. *Compare* Opp. 3 *with id.* at 5.

In addition, Respondent not only mischaracterizes what the Missouri Supreme Court found as a factual matter, but wrongly suggests that this Court is bound to accept the conclusions and characterizations of the court below concerning the nature and thrust of Westfall's comments. Opp. 7. In First Amendment cases, this Court must independently examine the whole record to make sure that the judgment below does not improperly impinge upon free expression, and that is particularly so where, as here, the critical issue is the presence or absence of actual malice. *See, e.g., Bose Corp. v. Consumers Union of United States*, 466 U.S. 485 (1984).

4. Respondent further argues, wrongly, that this case presents no conflict among state supreme courts. The Missouri Supreme Court below expressly acknowledged the existence of a substantial conflict among state supreme courts on whether a departure from the traditional *New York Times* standard is warranted in lawyer disciplinary proceedings (Pet. App. 13-15), and the conflict further is irrefutably demonstrated in our petition (pp. 11-16).

Respondent's argument to the contrary rests on the untenable proposition that any disagreement among the state courts simply reflects that *New York Times* sets a minimum standard, and that other states "are free to apply a more protective test." Opp. 17. What respondent conveniently ignores, of course, is that unless the state courts are exercising this 'freedom' through construction of state law, as opposed to federal constitutional interpretation—which a review of the conflicting state decisions discloses is not the case—the resulting difference in free speech protection is precisely the kind of conflict that warrants this Court's resolution.[3]

5. Finally, respondent's assertion that this case is wholly unrelated to *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720

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[3] Moreover, as discussed at pp. 14-15 of the petition, among the state court cases which give rise to the conflict are decisions which are *less* speech protective than the decision below or *New York Times*.

(1991) is misguided. Both *Gentile* and the present case involve different facets of the same overall question—the extent to which the First Amendment restricts states from imposing professional discipline against lawyers for exercising their rights to free speech.

Gentile suggests that lawyers' free speech rights may be restricted when, but only when, unfettered speech would impinge upon some other fundamental right, e.g., by prejudicing an adjudicative proceeding and thereby infringing the right to a fair trial. Respondent neither does nor could argue that Westfall's comments could have prejudiced any adjudicative proceeding. Opp. 13. The only conceivable legitimate state interest in curbing comments like Westfall's is the interest in protecting the good reputations of courts and judges; but this Court already has held that this interest, while genuine, is not of sufficient magnitude to warrant suppression of free speech. *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 841-42 (1978). Therefore, *Gentile*, in suggesting that lawyer speech may not be restricted absent a substantial countervailing state interest, is directly relevant to this case, and the Missouri Supreme Court's decision is inconsistent with it.

CONCLUSION

This case squarely presents the constitutional issue of whether the *New York Times Co. v. Sullivan* test for actual malice—and particularly the subjective "reckless disregard" component of that test—applies in disciplinary proceedings brought against a lawyer for criticizing a judge. The facts of this case are undisputed, and the issue is sharply framed by lengthy majority and dissenting opinions. This case, therefore, provides an excellent vehicle for resolving the issue. We respectfully submit that the petition for certiorari should be granted for plenary review.[4]

Respectfully submitted,

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Dated: November 21, 1991

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[4] Alternatively, we request that the Court grant the petition, vacate the judgment of the Missouri Supreme Court below, and remand for that court's reconsideration in light of *Gentile*.